ADMINISTRATIVE LAW

ITS GROWTH, PROCEDURE, AND SIGNIFICANCE

A Series of Lectures

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ADMINISTRATIVE LAW

ITS GROWTH PROCEDURE AND SIGNIFICANCE

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PREFACE

THE four lectures here printed were delivered under the auspices of the School of Law of the University of Pittsburgh on September 27 and 28 and October 4 and 5, 1940. They are printed substantially as delivered. Since they were delivered the report of the Attorney General's Committee on Administrative Procedure, and the Monographs prepared in connection with the work of that Committee, have raised some further questions as to federal administrative agencies and have furnished important materials bearing on those questions. But the subject is much wider than one of federal administrative procedure. Administrative agencies in the states show the same tendencies, and raise much the same problems as those raised by the agencies of the general government. The lectures are addressed to the situation in the country as a whole, not specially to federal agencies nor to the specific problems which the latter present.

It should be added that the address "Substitutes for Law," printed with the lectures, was delivered at a dinner of the Allegheny County Bar Association in honor of Dr. Eugene A. Gilmore, Dean of the School of Law of the University of Pittsburgh, on October 4, 1940. Having been written for a different audience from that

which heard the lectures, at one point there is a short and partial repetition. But it seemed better to print both lectures and address as given than to rewrite them because of a part of a paragraph.

R.P.

Harvard Law School, August 27, 1941

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FOREWORD

AS I was among the first to recognize Roscoe Pound's genius as a practical philosopher—that was in 1906, upon listening to his famous address at Minneapolis on "Causes for Popular Dissatisfaction with the Administration of Justice"—I now am gratified to associate myself, thirty-five years afterwards, with this his latest contribution to practical philosophy. Not being a philosopher myself, but only (when feasible) a promoter of philosophers and philosophies, I can look with easy-minded detachment upon the variant schools of thought that seek to lay solid foundations under the structure of law and justice.

Pound stood forth, in the early 1900's, as the first lawyer in this country whose philosophic system was based upon a comprehensive acquaintance with the already regnant systems in Europe—not only the general philosophies (Kant, Hegel, Spencer, Comte) but with the specifically legal philosophies. There were indeed already worthy American jurists who offered systems; but none had developed them, by comparison and selection, out of a wide acquaintance with the Continental masters; for the works of the latter had been hidden in languages which to Pound were already open books.

Another individual specialty of Pound's philosophic

deliverances was their constant tendency to point out their applications to everyday aspects of Law and Justice. This was what promptly gave his writings and speeches such a hold on the everyday members of Bench and Bar. They could see that there was a direct connection between the abstract fundamentals of philosophy and the trends and problems of familiar legal principles and rules. Thus he popularized the philosophy of law in this country, in that his work made it easier for all others in the same field (and there soon were others) to get a hearing.

Of course, another strong asset in commanding respect for his utterances was his unusual, if not extraordinary acquaintance with the history of law and practice, in England and in this country. No one has excelled him, nor even equalled him, in this combination of attainment. There is a magnetic convincing power when History is adduced to explain the present and to re-enforce Philosophy.

All three of these features are here immanent, combining to give these lectures a persuasive power such as any one of the rest of us may envy.

JOHN H. WIGMORE
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"Government . . . is an art whereby a civil society of men is instituted and preserved upon the foundation of common right or interest; or, to follow Aristotle and Livy, it is an empire of laws and not of men."

—JAMES HARRINGTON, *Oceana*, in WORKS. Ed. 1737, p. 37

"The practice of government is rapidly changing before our eyes and, as yet, the movement is largely without guidance or principle. With respect to activities of first importance, we are turning to what, within broad limits, is personal government, relieved of the scrutiny and supervising heretofore demanded as the traditional safeguard of justice."

—CHARLES EVANS HUGHES

"The law ought to be supreme over all."

—ARISTOTLE, *Politics* IV (VI) iv, 31

THE PLACE OF ADMINISTRATION IN THE LEGAL ORDER

LECTURE I

BEGINNING about fifty years ago, a discussion, becoming more widespread and lively since the last world war, has raged as to the place of administration in the legal order, or, as it used to be put, the distinction between administration and law. Earlier, indeed, the matter was put as a contrast between administration and legislation as functions of government. Thus Sheldon Amos wrote in 1874:

> The activity of government is twofold in character. One portion of this activity is displayed in administration, that is, in selecting a vast hierarchy of persons to perform definite work; in marking out the work of all and each; in taking such measures as are necessary to secure that the work is really done; and in supplying from day to day such corrections or modifications as changing circumstances may seem to suggest. This task is of the highest degree of importance, and, in a very primitive condition of society, represents the largest portion of governmental action. In a very complete and advanced condition of society, again, the task of administration is one of inordinate magnitude and difficulty, but it is only a very subordinate agency in the whole process of government.
>
> The rival agency is that of legislation, or the formulating

of general rules, addressed to all persons, or to certain classes of persons in the community, and directing their actions in certain ways specified in the terms of the rule. In the place of the incessant supervision implied in administration, the persons to whom these rules are addressed are left to themselves, and only interfered with after the rules are broken. A large class of functionaries, judicial and executive, are called into being for the purpose of ascertaining whether these rules are conformed to or not; if not, who it is who fails to conform to them; of punishing such refractory persons; and of publicly expounding the true meaning of these rules, should doubts in reference to this meaning arise in any quarter.

In this way of thinking, administration and lawmaking are rival political governmental activities and adjudication is a third of a distinct nature, proceeding under the laws made by legislation and dealing with adjustment of relations, while administration has to do with the different services rendered by government other than the maintaining of justice through the disposition of controversies.

Later, with the multiplication of governmental activities, jurists saw that an overlapping was going on and began to consider the relation of the administrative and the judicial as one between administration and law. Administration, we were told, was the regulation of public or private affairs on a principle of expediency, while judicial justice (called law) was a systematic adjustment of relations and determination of controversies in accordance with an authoritative body of precepts developed and applied according to an

authoritative technique. On this basis Jellinek in 1887 held that the purely administrative activity of a politically organized society did not come within the conception of law. He held that law was conditioned by relations between persons and so a rule of law must be a precept delimiting the sphere of the free activities of persons in their relations with each other. In the same spirit Jellinek and later Laband argued that in the exercise of their free discretion in administering public affairs, the officials who exercised the powers of a politically organized society were acting outside of the law. In such matters the state was a political and ethical, not a legal, phenomenon. Still later, Pashukanis argued that law had no place in a society in which there were no conflicting individual interests to be adjusted and in consequence legal precepts would be replaced in the society of the future by what he called social-technical rules. Law, he said, was the typical agency of social control in an individualist organization of society; administration was the characteristic form of regulation in a social organization marked by "unity of purpose."

On the other hand, Kelsen holds that there is no essential distinction between law and administration. To him every act of public administration is in itself an act of law. Whether in the administrative process or in the judicial process, the force of politically organized society is applied by public functionaries to bring about some desired action or some desired condition. As Kelsen puts it, the state is a Midas in whose hands whatever it touches is transmuted into law. Something

of the difficulty involved in these divergent views grows out of use of the term *law* in different senses by the several disputants. But behind these attempts to get the good will of that term for different things, lies a fundamental question for jurisprudence and for the science of politics.

Law is a term used in three senses. The oldest meaning of the term among jurists refers to the body of authoritative precepts recognized or established as rules of conduct and of adjustment of relations among men, to be applied by the tribunals and administrative agencies of a politically organized society in determining controversies. Another meaning refers to what is perhaps better called the legal order—the regime of regulating conduct and adjusting relations by the orderly and systematic application of the force of a politically organized society. A third meaning refers to what is perhaps better called the judicial process, to which we must now add the administrative process—the process of determining the controversies involved in the regulation of conduct and adjustment of relations by applying to those controversies the authoritative precepts according to an authoritative technique. Kelsen in his pronouncement uses law in the second sense. Jellinek, Laband, and Pashukanis think of the first sense and of the administrative process as not governed by law in that sense, and so take law to be a judicial process controlled by a body of authoritative grounds of decision developed and applied by an authoritative technique.

Whether or not they are both governed or to be gov-

erned by law in the first sense above defined, there is a profound difference between the two processes. In the English-speaking world for a long time administration was substantially confined to carrying out the services, other than administration of justice, rendered by politically organized society. This older type seldom involved law incidentally, certainly never involved consciously administrative justice or administrative adjudication. As things have come to be, where there is much overlapping, administration characteristically seeks to guide conduct at the crisis of action and so to head off disputes, whereas judicial justice characteristically seeks to adjust relations and order conduct by determining disputes after they have arisen. Administration characteristically treats each case as unique. Judicial justice characteristically treats each case as an example of a type. But the guiding or directing function involves much incidental adjudication. There is an administrative determining function which may easily get beyond the incidental and when called quasi-judicial tends to absorb much that analytically and historically is judicial. Here is the crux of the matter today. The administrative process has not, at least in the English-speaking world, any well-developed technique of determination. It tends to override what judicial experience has taught us are fundamental principles of securing full and fair hearing to all interested parties and objective decisions. It has no well-defined ideals. Each administrative agency is likely to think of its immediate practical purpose as paramount and so as something to which all individual interests

must give way. The judicial process has long since achieved a definite authoritative technique of determination, applied in the light of definite authoritative ideals.

Again, the administrative process is primarily concerned with the guiding or directing function. Hence, too often it shapes its exercise of an incidental determining function to the exigencies and in the mold of the directing function. The judicial process, on the other hand, is primarily concerned with the function of determination. Hence, it sometimes shapes the exercise of an incidental administrative function to the exigencies of the determining function. Administration seeks to achieve the ends of social control by guidance and prevention. It is governed more directly by the immediate ends, whereas in judicial justice a balance of ends is sought by insistence upon means. Being governed by ends in unique situations and seeking to individualize determinations, the administrative process is personal and hence is often arbitrary and subject to the abuses incident to personal as contrasted with impersonal action or action regulated by law in the first sense. Well exercised it is very efficient; much more efficient than the rival system can be. On the other hand, the judicial process, acting according to law in the first sense, operates characteristically by redress or by punishment. General rules of action are formulated in advance and applied to controversies after they have arisen. In general it does not supervise action but leaves individuals free to act, at their peril of responding for resulting injury, or of restoring what they hold at the

expense of others, or of complying with their undertakings if they do not act in accordance with the rules prescribed. It is characteristically impersonal and safeguards against ignorance, caprice, or corruption of magistrates. But because of these safeguards there is a certain lessening of efficiency and the process is not quick enough nor is it automatic enough to meet all the requirements of a complex social organization.

As I see it, the three meanings of the term law are unified by the idea of social control. Both of the processes are processes of the legal order. Kelsen is quite right in that respect. Nor are all the precepts of law in the first sense applicable to the administrative process. The margin for discretion or individualization in the latter has to be much greater and it has to do with standards rather than with rules. Nonetheless, it is an agency of the legal order and so must operate systematically and in the English-speaking world subject to the requirements of the doctrine of the supremacy of law, fundamental in the Anglo-American polity.

It is here that we come to the real controversy. Today the advocates of absolutism regard law in the first sense as a disappearing phenomenon. They call it private law and urge a new type of ordering by the authority of a politically organized society (new at least to English-speaking lands) to which they give the name of public law.

"Public law," so wrote an English law teacher recently, "is gradually eating up private law. Industrial law is being controlled by administrative organs and is at the same time eating into the law of obligations.

Quotas and marketing schemes under administrative control reduce the operation of commercial law. Housing and planning legislation takes the law of property under public control. This is only to say that *laissez faire* has been abandoned, the public lawyer is ousting the private lawyer, and duties of institutions are superseding the ordinary rights and duties of private citizens." Certainly it is true that the lawyer of today is occupied more with matters depending before bureaus and commissions and boards than with matters depending before courts. It is true also that along with the giving up of the extreme abstract individualism of the last century there has come a multiplication of administrative agencies and a continual increase in the subjects committed to those agencies. It is manifest that the traditional American jealousy of administrative agencies has been forgotten and that there has come to be as strong a tendency to trust them as there was formerly to distrust them. But we have always had administrative bureaus and boards and commissions and officials in the common-law world. Some are quite as old as the courts. They had a development in the sixteenth and seventeenth centuries entirely comparable to the development today. The common law had its place for them. In Blackstone's system public law is a part of the private law of persons. Officials are persons and the law applicable to them is the law applicable to every one else. The law applied by administrative tribunals is the law applied by other tribunals—statute and common law, developed and applied by a received technique as in a common-law court.

Taken by itself, therefore, there is nothing in the rise of administrative agencies in common-law jurisdictions to indicate any such profound change as the extract quoted suggests. If the exercise of administrative powers is subjected to the law of the land, if those who wield those powers are judged by the law of the land when they go beyond them or employ them unreasonably and arbitrarily in contravention of guarantees which are the supreme law of the land, the common law stands as a great body of private law as much as it ever did. What, then, do European writers mean when they write, as so many of them do today, of the disappearance of private law?

According to the Roman law books, public law was that part which had to do with the constitution of the Roman state; private law was that part which had to do with the interest of individuals. So say the Institutes of Justinian. Ulpian added, as the whole passage from his Institutes is preserved in the Digest, that public law was "concerned with sacred rites, with priests, and with public officers." In the last century the Pandectists, or expounders of the modern Roman law on the basis of Justinian's Digest, were wont to say in effect that private law had to do with adjusting the relations and securing the interests of individuals and determining the controversies between man and man, while public law had to do with the frame of government, the functions of public officials, and adjustment of relations between individuals and the state. If the proposition with which we started refers to public law in the sense of the Roman distinction, we may admit that if the

frame of government is not more complex, the details are infinitely more numerous and minute, the functions of public officials have multiplied and the legal precepts relating to them multiplied correspondingly, and that the relations between individuals and the state have become more varied, more intimate, and more numerous. But everything with which the law has to do has become more complex, more detailed, more difficult to organize and put in the order of reason. Private law today, as compared with what it was fifty years ago, has grown to huge proportions, as a comparison of the digests of today with those of the eighties, or of the text books of today with those of the last quarter of the nineteenth century, or a comparison of our first law school case books with those of today, will bear witness abundantly. Obviously the proposition that public law is eating up private law, a proposition which our English writer is taking up from writers of Continental Europe, refers to public law in another sense. The term is not in our digests. One who looks for it in the literature of the common law will look in vain. Both in England and in America, constitutional law has been a part of the everyday law for the ordinary courts.

What is meant is brought out as something quite new to the common-law lawyer if, for example, we read Radbruch's philosophy of law. He tells us that "labor law and economic law," the latter meaning the legal adjustment of relations involved in trade, finance, banking, industry, transportation, public utilities, and the like, are "a penetration of public law into the domain of private law." By this he does not mean merely

that such things have in the English-speaking world come more and more under the jurisdiction of administrative boards and agencies. On the Continent, administration has always had to do with a large domain in the legal order. He refers to an entire difference in spirit between public law and private law, which he takes to be nothing less than opposition of the one to the other. Moreover, he holds that opposition to be necessary, founded in the very idea of justice, essential in the idea of law, and to be taken into account in every connection in which we have to do with legal phenomena. What is the distinction that involves this fundamental and necessary opposition between what since the Roman law had been taken to be two branches of the body of authoritative grounds of and guides to judicial decision and administrative determination?

We are told that we must start with a contrast between commutative justice, a correcting justice which gives back to one what has been taken away from him, or gives him a substantial substitute, and distributive justice, a distribution of the goods of existence, not equally but according to merit or a scheme of values. In the positive law this distinction, we are told, corresponds to a contrast between "the co-ordinating law," which secures interests by reparation and the like, treating all individuals as equal, and the "subordinating law," which prefers some, or the interests of some, to others according to its measure of values. To give an example, the common law of employer's liability was "co-ordinating law." It thought of employer and employee as equal and sought to put each, in case of

wrongful infringement of his interests, in the position in which he had been before the injury. On the other hand, workmen's compensation is an institution of "subordinating law." It puts the claim of the workingman on a higher plane of value, as one of greater merit, and imposes a liability upon the employer without regard to fault. To take a more general instance, where the nineteenth-century law of torts as a rule imposed liability on the basis of culpability, treating interests of individuals as of equal value, the tendency in Continental Europe in the present century has been to give over the idea of culpability in favor of an idea of security in which the interests of some are given a higher value. Public law, he continues, is a "law of subordination," subordinating individual to public interests and identifying some individual interests but not the interests of other individuals with those public interests. Moreover, as he sees it, all "co-ordinating law," that is, law co-ordinating individual interests by treating individuals as equal, gets its force from the "law of subordination," which identifies with public interests the interests co-ordinated, and hence public law has primacy over private law, subordination of individual interests over co-ordination of them. The primacy of public law is a primacy of state-established law. Public or subordinating law proceeds from the state, and private law depends upon it.

It will be noted that this reverses the common law conception in which the king rules under God and the law and his ministers and agents and all those who wield governmental power or authority stand on an

equality with every one else, and equality before the law is no less an attribute of every individual. To this, thinking evidently of Anglo-American pronouncements of the classical era and modern pronouncements to the same effect, Radbruch says that "what are called liberal conceptions" propose, under different forms, to reduce public law to private law by "dissolving the state into a contractual relation." He contrasts with this the collectivist, the autocratic, and the orthodox socialist or social individualist conceptions, which insist on the primacy of public law and pre-eminence of the state. But, he says, the motives of attributing this pre-eminence are different. For the advocate of an autocratic regime the motive is a concentration of all values in the collective person of the state. For the orthodox socialist the state ought to prevail in order to protect the concrete individuality of the individual against economic oppression. Achievement of this protection leads to penetration of private law by the spirit and methods of public law, and this, it seems, is what in English we have been calling "the socialization of law."

Radbruch considers the contrast or opposition between public law and private law as something given *a priori* and inevitable for any body of law, so that our common-law attempt from the Middle Ages to the twentieth century to reduce the whole law to private law was a futile kicking against the pricks. Certainly Bacon and James I and Charles I would have agreed with him, and perhaps a generation of English and American writers on administrative law, and a band of skeptical realists who seem to carry over their ideas

of administrative law into private law, agree also and may yet give Bacon the last laugh over Coke. At any rate, Radbruch demonstrates his proposition by the principle of security as a constituent element in the idea of law. To him, there are three such constituent elements: justice, the ideal relation between men; morals, the ideal individual development; and security. Each of these, he holds, is in an irreducible contradiction to each of the other two. That is, no one of them can be given its fullest and highest development in the legal order consistently with the others or either of the others. But we must admit each in the very idea of law.

Admitting it as a necessary element in the idea of law, he tells us the principle of security demands, on the one side, that the authorities empowered to formulate the law (in the sense of the body of authoritative precepts) be privileged, and on the other hand, that they shall be themselves submitted to the law which they formulate. The judges who make precedents under our common-law system must hew to the rules of law they lay down and the bureau officials who make rules must abide them or revise them in accord with the statute which gives them rule-making power. That is one side of security and is embodied in the common-law doctrine of the supremacy of the law. On the other hand, however, as he sees it, it is not possible to satisfy the demands of security except by a subordinating type of law which puts a special value on the position of these officials in the legal system.

I doubt this last proposition. We in the common-law world have achieved the end for at least two centuries

and a half by the co-ordinating type. But few Continental jurists understand the common-law form of public law. When constitutional regimes replaced the absolute governments on the model of the old regime in France, the theory was that the people succeeded to the sovereignty theretofore exercised by the king. The king was legally unaccountable and his ministers and agents were likewise legally unaccountable. They were held to their duties by the king, not by the law. Hence the people and their ministers and agents were legally unaccountable. The latter were accountable to the people, not to the law. The separation of powers was adapted to this theory. Each department of government was the judge of its own competency and its own powers. Each could interpret the constitution for itself and in its own way. But it is practically necessary that these departments and the bureaus in each and agencies of each work in harmony so far as possible. Hence, with no positive constitutional law in the English and American sense, those countries have had to develop what they call a positive constitutional law on the basis of a customary course of action, developed by experience, further developed by reason, and guided and expounded by doctrinal writers on a basis of natural law—i.e. of ideals of how harmonious working of all the agencies of government can be brought about. One is tempted to call this a positive natural law. It is midway between natural natural law (as one might call it) and the positive public law of the English-speaking world.

When it comes to be applied to common-law juris-

dictions, this idea of public law as a "subordinating law," putting a higher value on officials and what they do and allowing them to put a higher value on some persons or groups of persons than on others by identifying the interests of those persons or groups with public interests, is in effect an idea of supplanting law (in the sense of an authoritative body of precepts, serving as guides to decisions and determinations and developed and applied by an authoritative technique) by an unchecked magisterial and administrative adjustment of relations and regulating of conduct.

Let us see an example of public law in this new sense in action in America of today. In a case not long ago decided by a federal circuit court of appeals, it happened that the employees of a company were divided as between two rival labor organizations. The employer was quite willing to make a collective bargain as the law required and left it to the employees to determine to which organization they would adhere. The very great majority chose one and he made a contract with it. A small minority, however, preferred the other, and struck. They picketed the place of work, stopped all work, interfered with customers, and forced a complete and damaging suspension of business. Neither organization would apply to the National Labor Relations Board—one because it feared the board was hostile to it, the other because it knew it was in a hopeless minority. The employer finally sought to put an end to the *impasse* by appealing to the courts for relief against the continued holding up of his business by the small minority of strikers. But the court

had to deny him relief. A statute forbade the court's acting until the matter had first come before the board, before which the act creating the board did not allow the employer to bring his case. The interests of the employer and the interests of the majority of the employees and the interests of all those who had or wished to have business with the employer were subordinated to the interests of the small minority. This is the sort of legislation which our Bills of Rights were once believed to have sought to preclude and the courts steadfastly denounced a generation ago. If the courts in the last century sometimes co-ordinated interests too abstractly and thus, while seeking to promote a theoretical equality at times brought about unintentionally a practical inequality, at any rate they never deliberately and intentionally subordinated the interest of one to that of another in this fashion. Moreover, as they became conscious of the results, they gave over abstract equality for a concrete equality when there was a manifest difference, as has been apparent in decisions of the Supreme Court of the United States for two decades. One can understand why Continental adherents of the doctrine of public law as a "law of subordination" give up the idea of rights and have never taken up the idea of legal checks and balances between governmental agencies, maintained by the everyday law. Rights, that is, legally recognized and delimited interests, secured by the law, are a means of co-ordination. They belong to the regime urged by the great preacher of the Pilgrims: consociation, not subordination; "we are with one another, not over one another."

Rights stand in the way of subordination. So, too, with checks and balances. They impede the free subordination of the interests of one to those of another according to the hunch of the legislator or the administrative official for the time being.

As the penetration of public law, as a regime of subordination, into private law, goes forward, and it has been going on in this country more and more rapidly than is generally appreciated, we get a new definition of law. Those who think of a "law of subordination" interpret both the judicial and the administrative process in that spirit and tell us that law is whatever is done officially. It is not, as we used to think, under the influence of the common-law doctrine of supremacy of the law, that things may be done officially according to law or without law or against law, with appropriate legal remedy in the last two cases. What is done officially is law in itself.

At the beginning of the present century it was not uncommon to hear complaints of judicial usurpation of lawmaking power when courts applied the received canons of genuine interpretation to legislation in order to find a solution of a case within the field covered by and yet not clearly provided for in the statute. Often those who made these complaints turned about and complained of narrow rigidity when courts hewed to the plain requirements of the written law instead of going afield to find extra-legal solutions. That the two types of judicial action were entirely consistent often escaped notice. If a clear intention was clearly expressed there was an end of the matter. If there was not

and yet the case was within the purview of the statute, the court was bound to find an intention, with the aid of the received technique, and to find a reasonable one. The regime of co-ordinating interests required that. But as the idea of subordination grows at the expense of the idea of co-ordination, the search for a reasonable interpretation is taken to be unnecessary and, indeed, illusory. Very likely the lawmaker intended to be unreasonable; and if he may, if he chooses, be arbitrary and unreasonable, subordinating the interests of some to those of others as seems expedient to him, why should not judge and administrative official assume unreasonableness rather than reasonableness and make such subordinations for the case in hand as suits their ideas? Accordingly, it becomes the fashion to sneer at the judicial process carried on by applying an authoritative technique to authoritative materials and to dub the method illusion or superstition or pious fiction. It becomes the fashion to assert or insinuate that there are concealed motives of subordination beneath the surface. Even in academic lecture rooms, where a better idea of the judicial process ought to prevail, it becomes the style in some quarters to decry all attempts to put the phenomena of judicial decision in the order of reason.

It is worthwhile to ask what is behind these modes of thought; to inquire what has led to so complete a departure from the conception of law which had governed our polity from the beginning, and so rapid a taking over of ideas which we had regarded as wholly alien. Juristically they are characteristic of times of

transition when men are struggling to adapt the machinery of justice to new conditions imperfectly grasped, and in impatience at the cautious advance of the courts, seek short cuts through a reversion to justice without law—not without a judicial or administrative process, of course, but without authoritative precepts or an authoritative technique of applying them. Philosophically they are attributable to new modes of thought which have grown into fashion in an era of post-war disillusionment and cynical acquiescence in a revived absolutism which has largely grown out of that disillusionment. Politically they represent a reaction from the extreme tying down of administration and dogmatic application of abstract individualism in the last quarter of the nineteenth century.

In all new cases, and in this time of invention and rapid transportation and communication and economic unification new questions of every sort are presented to the courts by scores at every sitting, the courts hold themselves bound to proceed by a received technique of analogical reasoning. The crucial point in this process is choice of the initial analogy from among many of equal authority. Choice of these starting points for judicial reasoning is governed by reference to received ideals of the social order and so of the ends of the legal order and what legal precepts should be and should bring about in their application in view thereof. In the last century the received ideal was clear and definite. An idealized community of the rural, agricultural America of our formative era in which neighborhood and individual were economically independent

and self-sufficient was near enough to the facts and accorded with the received ethical and economic views of the public. Today no such clear and definite picture is possible. That the received ideal must be replaced by one nearer to the facts is evident and admitted. That redrawing of our picture of the ideal community is called for, is conceded. But we have not as yet been able to redraw it. We are not satisfied with the received nineteenth-century measure of values. A new measure for the twentieth century has not yet been formulated. In consequence, there is a general fumbling for a new idea of justice, such as has gone on more than once before in legal history in like eras. Juristic thought is affected no less than judicial decision. New theories of the social order have sprung up. The individual is no longer regarded as the unit. Some see a society made up of groups and relations and associations, which, therefore, call for a higher valuing than the individual. Some see a society made up of institutions, of undertakings and enterprises having a *de facto* significance and interests pressing upon the legal order for recognition. These institutions, it is taught, set up authorities and develop organs for the realization of their idea and bring about a community of interest among the members of the group toward realizing it. Their efforts in that direction are directed by the organs of authority and come to be more or less regulated by a definite procedure developed within the institution. Such an institution is before our eyes constantly today in the labor organization. We did not succeed well in the last generation in judging it by an ideal of a society

in which the individual man is the unit. But a technique for a society made up of institutions has yet to be developed. Such a technique is quite as likely to develop in judicial decision and doctrinal writing as in rough and ready trial-and-error administration. At any rate, it is worth noting that those who now urge preferring the institution to the individual are often the same who had been urging securing individual interests by a maximum of state action—by an omnicompetent political organization of society. In the progress of their thinking from social individualism to social institutionalism, they have been constant to one idea, namely, the idea of an autocratic power in public officials. They have continued to believe in supermen administrators free from the checks of law or rights or judicial review.

Philosophically, we may see behind the development of the new idea of public law and of a supplanting of private law, partly the Marxian economic interpretation of history and doctrine of the disappearance of law, partly pyschological realism, applying the Freudian idea of the wish to jurisprudence, and partly certain new types of thinking since the world war, either relativist and largely influenced by Einstein, or phenomenalist.

Marx thought of history as the record of a progressive unfolding or realizing of an economic idea—of an idea of the maximum satisfaction of material wants. This interpretation was little noticed till the last decade of the nineteenth century when it came into vogue on the continent. It spread to the United States in the

first decade of the present century. The idea behind it, the idea of satisfying material wants as the end and aim of society, rather than one of satisfying a spiritual want to be free, has gradually had a profound effect upon political and legal thought, and so upon political and legal institutions throughout the world. In a materialist polity there is no place for law. Marx urged that law was a product of class domination and that with the elimination of private property and consequent disappearance of classes, law, too, would disappear. For a time Soviet Russia went upon this assumption. Law was to be replaced by adminstration. As it was put, in the ideal society there is no law, or rather but one rule of law, namely, that there are no laws but only administrative ordinances and orders. This idea of the disappearance of law has been gaining acceptance in many quarters. Along with it has gone a rise of political absolutism in Continental Europe, setting a growing fashion of administrative absolutism everywhere.

Economic realism, as it calls itself, was the first outgrowth of Marx's economic interpretation. It holds that all action, all human behavior, proceeds on economic motives; that judges decide, lawmakers make laws, jurists work out theories of rights, and moralists develop theories of justice or of right and wrong solely as expressions of the self-interest of the dominant social class. Hence law is nothing but a formulation of class self-interest. Next came a combination of Marx and Freud in the form of psychological realism. This teaches that as a matter of psychology it is impossible for a human judge to decide objectively. He can only

do what his temperament and prejudices and predispositions, determined by his bringing up and social surroundings, dictate. A decisive element in the judicial process is the Freudian wish.

This was soon followed by a combination of Marx and Einstein and Neo-Kantian epistemology. Yellowplush said of spelling that every gentleman was entitled to his own. The skeptical relativist says that in political and legal thought every one is entitled to whatever starting point he chooses. Laws are only threats, and the making and enforcing of these threats are relative to the personalities of those who wield the power of a politically organized society for the time being. There are no rights. It is not that men have rights and the state makes threats in order to give effect to them. The ruling class has interests, and the threats made to secure them give rise to claims miscalled rights.

Most of all, however, the idea of public law as a subordinating law, replacing private law, has been furthered by the general acceptance since the world war of what may be called a give-it-up philosophy. According to the philosopher from whom I quoted at the outset, judgments of values cannot be proved or verified. Hence they cannot be recognized as valid except in the scheme of some individual system, and even in that system, valid for the individual whose scheme it is, the criterion of highest value is not demonstrable to that individual. The content of law and of morals are wholly different and coincide only by chance. Jurists of the nineteenth-century metaphysical school tried to bring about such a coincidence but failed because they

left out of account the ideal relation between men and the idea of security, that is, of a stable, harmonious, peaceable social order. Accordingly, of the three theories as to the basis of the binding force of the legal order, Radbruch tells us that none can give a satisfactory answer. As between the juridical theory that a law is only binding when commanded by a force imposing itself upon all other forces, the political theory that the obligation of law is based upon consent, and the philosophical theory that the value of law may be deduced directly from the idea of justice, each has a relative value, but there is an irreducible contradiction and at bottom everything is at large. Philosophy of law, to which we had always turned for help when the law found itself struggling to achieve new tasks, fails us. It gives up. Ultimately all is irreducible contradiction.

I can only say a word as to phenomenalism. It tells us that there is nothing behind or beyond phenomena. They are all that we have to do with. There is nothing behind them but their own phenomenality. They are all equally significant and equally insignificant. As one might put it, all phenomena were created free and equal. Hence every item of official action is valid in and of itself as a phenomenon. We don't qualify the phases of the moon as good or bad. It is unscientific to make such subjective value judgments. Therefore, we should not make them in the social sciences. Law in the co-ordinating sense is a futility when it seeks to systematize the items of governmental action which are valid and self-sufficient without regard to any system. What the official does is itself law. It is a self-

sufficient phenomenon. The law and the state itself are only the aggregate of official acts.

Let me be understood. I am not preaching against administration, much less against an administrative law which is a true law, and not a calling of everything law that is done by a commission or board or bureau because it does it. I recognize the need of administration, and of a great deal of it, in the urban industrial society of today. It is needed as an administrative element in the judicial process. It is needed as a supplement to the judicial process. It is needed as a directing process in a society so organized economically and so unified economically that things must be done more speedily, with more adjustment to unique situations, with more co-ordination of special skill and technical acquirements than the judicial process, looking at controversies after the event, can afford. But to admit that development of the administrative process is necessary does not involve admitting that it should be free of checks such as a due balance between the general security and the individual life has led us to impose on both the legislative and the judicial processes.

THE RISE OF ADMINISTRATIVE JUSTICE

LECTURE II

IN the last two decades of the nineteenth century, a reaction began from the extreme limitation of administration in our traditional polity. Where some peoples went to one extreme and were bureau ridden, we seemed to have gone to the other extreme and were law ridden. The traditional attitude had grown out of the administrative regime in Tudor and Stuart England and resulting conflict between the courts and the crown and the administrative regime in the colonies down to the Revolution in which bodies with no separation of powers and judges of their own powers and authority habitually acted with a high hand. The reaction, inevitable when the lines were drawn so rigidly, was accelerated by the demands of an expanding law of public utilities and the requirements of what has been called social legislation, which calls for inspection, supervision, and speedy and sure enforcement. More recently there have come to be ideas of making over the social and economic structure through administrative action. The result has been in the present century a rapid development of administrative bodies and agencies of every kind, a growing tendency to commit undifferentiated powers to them, a tendency on their

part to exercise powers beyond what are assigned to the executive in our polity, and an increasing advocacy of administrative absolutism not only by administrative officials but by teachers and students of jurisprudence and politics.

There was for a while a strong tendency to take away judicial review of administrative action wherever it was constitutionally possible and where it was not possible, to cut down such review to the unavoidable minimum. This was manifest especially between 1900 and 1916 in statutes for the regulation of public utilities. An avowed object of most of the statutes on this subject was to do away with the delay, expense, and then uncertainty of litigation, and this end was sought to be attained by setting up administrative tribunals, not merely to direct and prevent, but to adjudicate disputes, and by making their determinations final so far as possible. In part, this was a return to personal or mechanical modes of disposing of controversies rather than await the slower process of an exact measure of justice. This is evident in the schedules in Workmen's Compensation Acts, which often remind one of the tariffs of composition in the dooms of an Anglo-Saxon king. After the world war this tendency abated somewhat for a time, but has revived and has become strong again in the past decade.

At the end of the last century administrative agencies had two very real grievances against the common law and judicial review as developed under the common law in the United States. Under the common law as we received it in this country, proceedings in a court

of law, proceeding according to the course of the common law, were reviewable by writ of error upon the record of the lower tribunal. From an early date we assimilated other judicial tribunals to the common-law courts. They were or were made courts of record, i.e., courts in which "the proceedings were enrolled for a perpetual memorial and testimony." Where there was such a court of record, its record imported verity. It could be reviewed for errors appearing on its face, but it could not be contradicted and proved itself, and what it recited as having been done was established without more. On the other hand, where there was an administrative agency or tribunal having no such record and not proceeding according to the course of the common law, the proceedings did not prove themselves. The proceedings and the truth of the matters recited or determined, if disputed, were to be tried in the reviewing court. Moreover, the jurisdiction of a tribunal not of record was not presumed. It had to be shown, and this meant that every fact necessary to the administrative determination might have to be shown *de novo*. Any defect in following the requirements of law might be fatal. The good sense of American courts liberalized this situation gradually to some extent, but it took legislation to do away with all its consequences and give to the proceedings of administrative agencies the weight and credence to which they were entitled.

A second grievance a generation ago was the enforcing upon administrative tribunals of the rules of evidence developed by the common-law courts to meet the exigencies of jury trial. Provisions that the legal rules

of evidence should not apply to administrative tribunals and that their proceedings should not be examined for infringement of such rules became common. As often happens, in getting away from one abuse another was created. These statutes, in the zeal of the draftsmen to get away from technical rules of evidence, often seemed to dispense with all rules and leave such tribunals free to act without any basis in evidence of rational probative force. In some states, the findings of fact made by public utility commissions were made conclusive. In others, the courts in reviewing administrative proceedings were restricted to a case certified to them by the commission.

Soon the reaction went much beyond restriction of judicial power with respect to regulation of public utilities. For two decades at least in the present century from fifteen to twenty statutes giving wide powers of dealing with the liberty or property of citizens to administrative boards, to be exercised summarily or upon such hearing as comports with lay notions of fair play, were to be found in the annual reviews of current legislation. Later there was for a time a tendency to consolidate and systematize these commissions. But in the meantime they began to be set up by the federal government with increasing frequency.

Since 1900 the venue of litigation over private water rights has been shifted from the courts to state boards of engineers or administrative boards of control. Workmen's compensation legislation has taken a great mass of tort litigation out of the domain of adjudication and confided it to administration. It is not unlikely that

injuries to passengers in railway and bus accidents and injuries in automobile accidents may presently go the same way. Unfair competition, corporate reorganization, corporate mismanagement and deceit in the issue of securities have in large part gone the same way through federal legislation. Even in criminal causes, which we think of as *par excellence* the domain of the common law, juvenile courts, boards of children's guardians, probation commissions, parole commissions, and other attempts to individualize the treatment of offenders, and the endeavors of the medical profession to take questions involving expert opinion out of the forum and commit them to some sort of medical referee, bid fair to introduce an administrative element into punitive justice which is wholly alien both to our inherited ideas and to the lessons of our experience. Indeed, a recent book published by a professor in a law school advocates turning over murder cases to a homicide commission.

Nor has the legislature been alone in bringing back this non-judicial element in determination of private rights, which had been all but excluded from our polity. If we look back over the course of decision for the past sixty years it will be seen that the judiciary has been falling into line and that powers which two generations ago would have been held purely judicial and jealously guarded from executive exercise gradually came to be held administrative and are now cheerfully conceded to boards and commissions. Some courts have hesitated while some have been willing to give up everything but formal actions at law and suits in equity.

Prior to 1880 the state courts generally held to an over rigid analytical doctrine as to the separation of powers and in consequence tended to hold all matters involving a hearing and determination, whereby the liberty, property, or fortune of a person might be affected, to be exclusively judicial in nature. After 1880, the cases, at first requiring a possibility of appeal or of judicial review, but later casting off more and more of that remnant of the older doctrine, have tended more and more to hold every sort of power which does not involve directly an adjudication of a controversy between man and man, and in some cases such as disputes over water rights, those which do, to be administrative in character and a legitimate matter for boards or commissions or bureaus.

Irrigation statutes afford an excellent example. Disputes over water rights, where the conflicting claims of numerous appropriators, who had often "appropriated" many times over the maximum flow of the stream, threatened to give rise to a multiplicity of suits, were first taken in hand by equity. The suit to "adjudicate a stream" became a familiar proceeding. Later the matter was taken in hand by legislators and statutes were enacted whereby the power to determine the nature, priority, and effect of the several appropriations and to apportion the use of the stream was given to a state engineer or to some administrative board. In 1870, a pioneer statute of this character was held unconstitutional on the ground that the power conferred was judicial. Twenty years later, the question was coming up again and before a quarter of a century had

passed the courts were agreed, quite rightly, that the power was not exclusively judicial and such statutes were upheld. Again, the older decisions were reluctant to concede to executive boards any power of hearing and determining charges against public officers and of removing them after such hearing. Later cases settled, again quite properly, that this power of removal after investigation may be given to executive officers or boards by legislation. As late as 1883, a statute giving a board of county commissioners power to hear and determine complaints against holders of licenses and to revoke licenses accordingly was held bad as giving judicial power to executive functionaries. Subject to requirements of due process of law, such statutes are now rightly upheld.

Again, decisions in the present century establish that power conferred upon a state board of land commissioners to cancel leases of state lands for fraud in procuring them is at any rate not exclusively judicial, and have reached the same result with respect to the decision of an executive official refusing to issue a patent to state land. As late as the second decade of the present century, courts were not agreed how far the exercise of wide powers of determining title to land under land registration statutes was exclusively judicial. It was long a matter of dispute how far the power to transfer inmates of a reformatory to a penitentiary for mistake as to age, incorrigibility or like cause, was judicial; but very wide administrative powers with respect to parole and probation and transfer came in the end to be upheld.

There had always been less rigidity in the application of the doctrine of separation of powers by the Supreme Court of the United States. But that court, too, has gone far in the present century. For example, it has been held that Congress can give to an executive official the interpretation of a statute and that in such case, unless the interpretation is "capricious or arbitrary" the courts cannot review executive action, even if they would interpret the statute otherwise. The fifth amendment may be invoked but not the separation of powers. This comes pretty close to a *lex regia,* and the holding that Congress may authorize the Secretary of Commerce, without judicial trial or review, to impose on and exact from a transportation company penalties for violation of a law comes pretty close to the administrative criminal law which the Tudors and Stuarts sought in vain to introduce into our legal system.

I do not doubt that this change in the course of decision is perfectly sound and no real infringement of the constitutional separation of powers. But conceding this we do not concede the further change, now urged on behalf of administrative boards and agencies, which would relieve them from effective judicial scrutiny of their action to see that they keep within their statutory powers, that they interpret and apply rightly the law governing their action in a particular case, that they in reality and not in pretense apply the standard committed to them, and that their action and proceedings conform to due process of law. Nor can we concede that review, if allowed, should be committed to administrative superiors or administrative courts. But of this

there will be much more to say in a subsequent lecture.

In Great Britain there has been a struggle to keep the power of legislation in Parliament. Administrative lust for power has procured what are called Henry VIII clauses giving wide powers of lawmaking by proclamation. With us nothing so bold has been attempted. Yet more subtle means have been giving administrative agencies much of the legislative power which the law denies them. For example, there is an observable tendency of commissions to substitute shaping of policy to the exigencies of vaguely conceived ideas of public good for the legislative pronouncement by which their action is supposed to be governed. It is not merely, therefore, a matter of keeping judicial power in the judiciary but also of keeping legislative power in the legislature. There are those in our law schools today who advocate a complete fusion of legislative, executive, and judicial power in administrative boards and bureaus and agencies. Even without constitutional amendment authorizing this, administrative agencies are likely to achieve it in substance unless judicial scrutiny of their action can be preserved and made effective.

If there is need of individualizing the application of law, there is no less need of holding that individualization to the demands of due process of law; and it is quite possible to do this without superseding administrative by judicial discretion. Once established an absolute bureaucracy will not be easy to dethrone. Control of an omnicompetent administrative hierarchy, accountable only to an ultimate administrative head, will

prove as effective a means of absolute government as was formerly control of an army.

What are the reasons for this radical change in our attitude toward administration which has taken place gradually in two generations, has become noticeable in the last thirty years, and has given rise to ideas of administrative absolutism within a decade?

Some of the reasons have been operating throughout the world. One is undoubtedly changing ideas of justice, a problem of adjusting the law, shaped by the abstract individualism of the past three centuries to the ideal of social justice which has been slowly taking shape in the present century. Another is the increasing economic unification and consequent specialization; the increasing complexity of social and economic organization and division of labor. Partial reversions to justice without law are perennial in legal history, serving, whenever a legal system fails for the time being to fulfil its purpose in whole or in part, to infuse into it enough of current morality to make it workable.

An instructive parallel may be found in the history of our legal system. In the middle of the sixteenth century, lawyers began to complain that the common law was being set aside and that scarcely any business of importance came to the king's courts of law. In the reign of Queen Mary, an observer wrote that the common-law judges had little to do but to look about them. In criminal law, where cases were of any political importance, examination of the accused by two or three doctors of the civil law came very near becoming a normal part of English procedure. Where the growing

point of the law had been in the king's courts of common law, for a time the growing point shifted to quite another type of tribunal. That was the age of the King's Council, of the Star Chamber, of the Great Councils, of the Court of Requests, of courts of summary procedure. It was the time when for a season legislation allowed justices of assize and justices of the peace, except in cases of treason and felony, to proceed for violations of statutes upon information and in their discretion. The movement away from the common law was a movement away from judicial justice administered in courts to executive justice administered in administrative tribunals or by administrative officers. Using law in its oldest sense of a body of authoritative guides to decision applied by an authoritative technique, it was a reaction from justice according to law to justice without law; and in this respect, too, the present movement away from the common-law courts is parallel.

It has always been recognized that alongside the law, which treats the individual case as one of a type to be determined by a general precept applicable to all cases of that type, there must be some agency of individualization treating cases according to their unique features. Aristotle gave us a theory of individualization. Equity both at Rome and in England arose to meet this need. But always in their beginnings those agencies of individualization operate not only unsystematically but arbitrarily and one-sidedly. The Institutes of Justinian tell us that Augustus first enforced testamentary trust inheritances "being moved by favor

of persons." We are told that the Frankish kings gave relief *"secundum aequitatem"* to those whom they had taken under their special protection. The English chancellors at first gave relief out of "alms and charity" and bills in equity of the reign of Henry V claimed relief on the ground that the complainant was a widow or was an old soldier who had fought for the king in his wars in France. If not the Praetor, certainly Emperor and King and Chancellor seem to have acted at first without rule or principle on general notions of sympathy for a wronged or a weaker party. That in the sixteenth century and the fore part of the seventeenth century English equity was largely justice without law no doubt commended it for a time to a busy and impatient age, as offhand administrative justice commends itself to an age in some respects similar today. We may well compare the courts developed in and for feudal England, struggling to meet the wants of England of the Reformation by a medieval procedure and feudal property law, with American courts, developed in and for the pioneer or agricultural communities of the first half of the nineteenth century, struggling to meet the wants of today with the organization and procedure and substantive law devised for such communities.

At the beginning of the present century there were six points of pressure upon our law. One was the need of better provision as to industrial accidents growing out of wholly changed conditions of work with machines and in mills and factories. Another was the increasing need of adjustment of relations of employ-

ment in view of claims to vested rights in one's job. Still another arose from what we were wont to call social legislation which called for more assured and speedy enforcement and more effective preventive action than had been true of the lawmaking of the past. Again, there were the demands of life in crowded urban communities, such, for example, as traffic regulation. Likewise, the great increase in the volume of litigation called for simpler and speedier procedure. Finally, there were new demands on the legal order in an age of secularization in which the law was called on to do much which had been in the province of the home and the church. To some extent these causes of pressure upon legal institutions were operative everywhere. But there were special reasons for dissatisfaction with judicial justice which were more immediately American.

One was over limitation of administrative agencies in the face of increasing need of administrative direction and individualization and call for administrative application of standards in many fields of adjustment of relations and regulation of conduct. For historical reasons our formative era distrusted administration, of which we had experienced much in colonial times, and that distrust led to overdevelopment of the inherited common-law attitude toward administrative agencies. Secondly, the archaic organization of courts and hypertrophy of procedure which obtained in nineteenth-century America stood in the way of effective judicial handling of matters of much urgency calling for quick and effective disposition. In the distrust of

the executive which obtained for the first century of our constitutional existence, there was much in the way of attempts at legislative and judicial administration. For example, there were statutes devolving regulation of grade crossings of one railroad by another on courts of equity as late as the seventh decade of the last century. Our procedure was not equal to such things, even if they had been adapted to judicial justice. The attempt to handle them by special legislation or by administrative proceedings in court inevitably broke down and turned attention to the possibilities of executive justice.

Most of all, however, a bad balance between judiciary and administration was brought about for a time by a mistaken attempt to carry out the doctrine of separation of powers to an analytical logical extreme. In largest part our difficulties with that doctrine have arisen from nineteenth-century analytical attempts to maintain theoretical absolute lines. It was assumed that every power and every type of governmental action must of necessity be referable once for all, exclusively and for every purpose to some one of the three departments of government. The sound legal political sense of John Marshall saw long ago that there were powers of doubtful classification—powers which analytically or historically or from both standpoints might be assigned to either of two departments. In such cases he saw that it could well be a legislative function to assign exercise of the power to an appropriate department. But it was not till the second decade of the present century that this solution became established in the

decisions in the face of analytical attempts to put everything for all purposes and exclusively in one place. New York at one time would not allow a court of equity to carry out a charitable trust *cy pres* because the power, if historically judicial, was thought not to be so analytically. We were awakened to the impossibility of such doctrine by the exigencies of rate making. The courts and the profession came to see that regulation of procedure and regulation of legal education and admission to the bar and organization of the bar by rules of court, if analytically they might be held legislative in nature, were historically judicial. Legislation turning these matters over to the courts and legislation turning rate making and application of standards over to administrative agencies do not derogate from the constitutional separation of powers. In practice we have come to a combination of analytical and historical criteria tempered by recognition that there are powers of doubtful classification which may be exercised by either of two appropriate departments as the legislature may decide. But the older analytical logical idea long hampered administration.

Dissatisfaction with the judicial administration of justice as it had come to be in this country and consequent turning to administrative adjustment of relations and ordering of conduct is not, however, the whole story of the urge to free administrative agencies from legal checks and judicial review which has become increasingly manifest in recent years. A contributing cause has been the rise of the executive to leadership in our polity, coincident with a movement

toward personal government and executive absolutism throughout the world. So far as ours is an English polity, it derives from seventeenth-century rather than from eighteenth-century England. It is a polity of the era of the Puritan Revolution not of the era of the French Revolution, and much less one of the era of the Russian Revolution. As I have said on other occasions, an American president or governor is analogous to a Stuart king. The latter ruled with Parliament and with the courts if he could, and in spite of them if he must. In like manner a president or governor governs with the legislature and the courts if he can and in spite of them or some one of them if he must. In practice, the relative position of the legislative, the executive, and the judicial departments in our governments, national and state, has shifted. From independence to the Civil War the hegemony of the legislative department is clear enough. Legislators thought of themselves as peculiarly the representatives of the sovereign people, with all the powers of that sovereign devolved upon them. They asserted that courts were accountable to them for decisions. As late as the impeachment of Andrew Johnson it was confidently asserted in Congress that the executive was accountable to the legislative for exercise of powers committed to the executive by the constitution. In the fore part of the nineteenth century there was an idea of legislative omnicompetence analogous to the idea of administrative omnicompetence which we may see today. The legislative was the first of our departments of government to develop. It had become well developed in characteris-

tic American form by the end of the seventeenth century. Organization of the judiciary in courts manned by judges and distinction between judges and magistrates with general administrative powers has its significant beginning at the end of the seventeenth century when legislative development was substantially complete. Before the Revolution the executive was a royal governor who could afford no model for us after independence. The executive departments in our governments, national and state, had to be developed after independence.

After the Civil War the hegemony shifted for a time to the judiciary. Almost every act of legislation and of administration encountered judicial scrutiny, and the analytical attempts at exact and detailed assignment of every feature of governmental action exclusively to one department, of which I have spoken, and attempts to reduce the standard of reasonableness, prescribed in the bills of rights, to detailed rules analogous to rules of property, gave the judiciary for a time too much weight in the scale, as the legislature had formerly attained an over weight. In the present generation the hegemony has quite as definitely shifted to the executive. I need not go into the economic and political causes of this. But the resulting over weighting on the executive side has furthered the development of ideas of administrative absolutism. This need not mean, however, that we are to give up what has been fundamental in our polity from the beginning. In the past, the balance has come back. Thus far no department of government has been able to make its temporary

leadership permanent. The essentials of the system of balance and distribution of powers have remained.

Yet while the hegemony of the executive for the time being and the rise and development of administration do not of themselves call for a giving up of our constitutional legal polity, certain fashions of recent academic thinking and teaching, and certain philosophical ideas current throughout the world tend toward a regime of administrative government, a law unto itself and free of constitutional checks judicially enforced. There has been no fundamental law in England since 1688. But the seventeenth-century judges believed in one and Lord Holt as late as 1701, a dozen years after the revolution which established the absolute authority of Parliament, still held to that belief. The English books which were read in this country before and at the American Revolution, taught the doctrine of a fundamental law and the colonies each had such a law in its charter. In 1776, Virginia in its constitution and bill of rights set up a fundamental law and the federal constitution and the state constitutions thereafter followed this example. The English Court of Common Pleas had enforced the separation of spiritual and temporal jurisdiction as fundamental law in the sixteenth century and twice in the fore part of the seventeenth century the Common Pleas had laid down that Parliament could not make a man a judge in his own case. Nineteenth-century English writers brought up on the doctrine of absolute sovereignty in Parliament, to whom that seems as natural and inevitable as the separation of powers seemed to the nine-

teenth-century American lawyer, have engaged in no little logical acrobatics to fit these cases into the ideas of the polity which has obtained since 1688. English writers and English trained teachers have brought ideas of parliamentary or legislative absolutism to this country and reinforced the dissatisfaction with judicially enforced fundamental law which grew up at the end of the last century.

Thus there has grown up a teaching that balance of nation and state, balance of legislative, executive, and judicial, both in nation and in state, is an outmoded idea of the eighteenth century. It is said to belong to the age of etiquette, the age of overrefinement, when every practical activity was embarrased by ceremonial and checks; when the colonel of an English regiment could in the midst of battle take off his hat to the colonel of the French regiment opposing him and say, "Gentlemen of the guard, fire first"; when soldiers went into the field dressed for the ballroom; when a force sent on a forced march to rescue their comrades could come on the field too late because they had to halt ten times in a mile to dress ranks, when an army could be surprised because its thoroughly drilled pickets marched up and down their beats with their eyes to their front after the manner of the barracks drill ground. Much of the spirit of that time did get into legal procedure. But the political system of checks and balances goes farther back and is quite independent of eighteenth-century fashions.

If we are inclined to give up the distribution of power between nation and states and to set up omni-

competent central administrative agencies reaching out into every locality and dealing in their own way, free of effective judicial review, with every form of enterprise and activity, we must pause to remember that only a federal government or an autocracy can rule a domain of continental extent. Confederacies and leagues have fallen apart. Consolidations of independent states, unless in a limited domain, have developed into autocracies. The German-Roman empire of the Middle Ages fell apart. It was neither autocratic nor federal. The British Commonwealth of Nations has fallen apart politically. Russia has only changed its type of autocrat. On the other hand, the United States and Canada and Australia and South Africa show us what we may well call continental domains held together politically, sometimes under great strain, by a federal polity. Where the domain is so large, the choice in the end is between federal government and autocracy. Federal government in its very nature calls for balance, balance of national and local government, balance of government and individual. Balance can only be maintained by a constitution which is the fundamental law. A federal government must be a government under law. In Canada, Australia, and South Africa, where there is a federal government, a balance of the national and the local, a distribution of powers, and a constitution which is the supreme law of the land, courts have to and do pronounce legislative and administrative action *ultra vires* just as we should call it unconstitutional.

In my first lecture I spoke, in another connection,

of the give-it-up legal and political philosophies which have become more and more fashionable of late. These philosophies lend themselves to political absolutism as definitely as the nineteenth-century philosophies stood behind the political ideas which had developed out of experience in our formative era. Give-it-up philosophies are not a new phenomenon in the history of philosophy. A radical change analogous to the change from the political philosophy of the last century to that of the present took place in Greek philosophy in the Hellenistic era. That era had much in common with our own. The Peloponnesian War had exhausted the Greek city-states. All Greece had fallen into the hands of Philip and had been swallowed up in the empire of Alexander. Then on the death of Alexander that empire had fallen apart and was being fought for by Alexander's generals and successors. An age of independent city-states, with more or less democratic polity, was succeeded by one of great military empires ruled autocratically. The mark of the thinking of the time was disillusionment, just as it was the mark of the thinking of the decades following the last world war. Epicureanism and skepticism, both of them give-it-up philosophies, were exactly the philosophies we should expect to grow strong in such a time.

Epicurus was wholly indifferent as to the form of political organization and thought of justice not as a regime—did not think of public justice as a phase of social control by politically organized society—but as something variable, involved in men's dealings with one another, to be looked at from the standpoint of

the individual happy life. He held that public life was something which the wise man would shun. It would not matter to him who was at the head of politically organized society, nor how he wielded the power of that society. If the ruler was wise, then the wise man, seeking to live a happy life, need have no fear of being disturbed by him. If the ruler was a tyrant, then the wise man, like Br'er Rabbit, would "jes lie low" and so escape the tyrant's notice. The skeptics, Pyrrho and Carneades, came to the same result in their social and political philosophy. The wise course was to do nothing about such things. Just as the nineteenth-century philosophers came to the conclusion that the highest good was free individual self-assertion, but reached it from different starting points, so Epicurus and Pyrrho and Carneades came to the conclusion that the highest good was a condition of undisturbed passivity, making the best of things as they came, although they reached it from different starting points. In the same way the give-it-up, realist social philosophies of today teach that judgments of good and bad and attributings of praise and blame to legal and political institutions and the action of political functionaries are unscientific and the scientifically minded man will not indulge in such superstitious performances. Official behavior patterns and the facts of exercisings of official power are phenomena and are to be observed as such. But they are no more to be praised or blamed or measured by standards of value than one may criticize the phases of the moon.

Likewise the Puritan idea of a covenant of a people

not to do certain things and only to do certain other things in a specified way is held by a contemporary school of political thinkers a contradiction in terms. A democracy must in the very nature of government be an absolute democracy, and since, as the realist sees it, a government means the men who in the time and place wield the power of a politically organized society, the rule of an absolute democracy means the absolute rule of its ministers and agents. The basic idea of our bills of rights is fallacious and we are to give up all we have done for free government in the new world since the seventeenth century.

Perhaps partly in reaction from the overenthusiasm for Magna Carta in the formative era of our institutions, but largely as a phase of the political philosophy of give-it-up, teachers of politics now tell us that Magna Carta was nothing but a compact between the King and his tenants in chief and is to be interpreted as an expression of the class selfishness of the barons. That colony after colony claimed Magna Carta as its birthright and that many colonies enacted it as a declaration of their fundamental law was, we are told today, a mere fashion. Magna Carta is a lawyer's myth. But Magna Carta as the lawyers knew it was more than a compact between King and barons to be given an economic interpretation in terms of the twelfth century. Its significant feature for the future was its general provisions for redress of the common grievances of all. It called for reasonable fines, proportioned to the offense and the offender. It called for justice as something of right, not to be sold, denied, or delayed. It called for security

of property, which was not to be taken for the King's purposes without the old customary payment. It called for security of the person. The free man was not to be imprisoned or banished or outlawed or disseised or deprived of his established privileges without a lawful judgment or otherwise than according to law. These general provisions, even if devised for particular grievances of a particular class in a particular time and place, were applicable to like grievances in any time and place. Moreover, without professing to deal in universals, Magna Carta responded to a fundamental and universal problem of human nature. The very features of human nature that make government and law necessary, yet make government and its legal agencies dangerous to the freedom they are set up to maintain and further. The English in the Middle Ages found how to have a strong central government along with local self-government, a strong administration tempered by strong courts and the doctrine of the supremacy of law. That is the polity we inherited and developed. As Mr. Justice Miller put it, the theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere.

Teachers have been telling us that the separation of powers was another fashion of eighteenth-century thought derived from a forecast made by Aristotle, for there was nothing of the sort in his time, and a mistaken interpretation of the British polity of his time on the part of Montesquieu. We are taught that it, too, is outmoded and ought to give way to the exigencies of administration in the polity of today. Recently this has

spread to at least one of the courts which intimates that the fundamental principle of our constitutions should not be taken too seriously under the conditions of the time. Nothing could be more mistaken. It was a part of the demand for a frame of government, a political doctrine of the Puritan Revolution which got a foothold in the contests between the courts and the crown in the seventeenth century. It was taken up in colonial America along with the doctrine of the supremacy of the law in the form given that doctrine in Coke's Second Institute. That book, printed by order of the Long Parliament, was hardly less than a legal political Bible to the framers of our polity. The common-law rights of Englishmen as expounded by Coke in his commentary on Magna Carta were claimed as the birthright of Americans not only in the political writing of the time but in the Declaration of Rights of the Continental Congress in 1774. Later, when it was sought to find a philosophical basis for the accepted claim, American writers turned to Montesquieu. The common-law rights of Englishmen were claimed as the natural rights of men and each were taken to be incompatible with unlimited centralized power.

It was not without good reason, based on experience, that Americans, almost at the moment independence was declared, set up written frames of government or constitutions and put the separation of powers at the foundation and a bill of rights in the forefront of them. From the beginning down to the Revolution the colonies had been subject to a completely centralized government with no distribution of powers and had

learned what this sort of government meant. Ultimately all power over what went on in the colonies was centralized in the Privy Council. It had ultimate legislative power to the extent that it could disallow all colonial statutes. It could thus veto any statute within five years, and at any later time, even if it had not been disallowed, could hold it void as in conflict with the colonial charter. It prevented a necessary organization of courts in Pennsylvania for twenty-one years. It overturned legislation making a modern provision for treating land as part of the estate of a decedent along with personalty. It disallowed statutes limiting appeals to Westminster from colonial courts. It insisted that colonial organization of courts follow the English model, and forced a regime of separate probate courts and separate courts of equity where the good sense of more than one colony sought to anticipate the unification of courts to which we are now moving.

Also the Privy Council had ultimate administrative power, controlling administration through instructions to the royal governors and requiring of the governors reports and addressing to them inquiries as to what they and the local magistrates were doing. Likewise, the Privy Council had ultimate judicial power. Appeals lay to it from the courts of the colonies and it jealously guarded its appellate jurisdiction against colonial legislation as to jurisdictional amount and time of taking appeals. The expense of such appeals was a heavy burden upon litigants, and one colony voted an appropriation to an appellee to enable him to defend his judgment at Westminster.All the powers

of government were concentrated in this body, which, as might be expected of a body of laymen, made little or no distinction as to the capacity in which it was acting for the time being. Thus when Georgia was under the rule of trustees, in whom all power was concentrated in this way, a defeated litigant in the Town Court of Savannah wrote a letter to the trustees giving his version of the case and complaining of the judgment. The letter having been read to the trustees, they at once made the cause their own and had a letter sent to the governor directing him to order the court to reverse its judgment.

In almost all of the colonies the same condition of centralized powers of government obtained. The governor was appointed by the crown and often he appointed the council. The Governor and Council were the upper house of the legislature. The Governor and Council were the head of administration. The Governor and Council were usually the highest appellate court, subject to review by the Privy Council. One need not say that this undifferentiated authority was exercised in the administrative manner. In South Carolina, it was exercised in one case in an administrative legislative act to take one man's land from him to give it to another. After the Revolution the highest court of the state held this act void as being in contravention of Magna Carta which had been received by colonial legislation as the fundamental law of the colony. Experience of this sort of thing in the seventeenth and eighteenth centuries led to the express and emphatic constitutional prohibitions of them in the constitu-

tions which followed on the heels of the Declaration of Independence.

Experience of government by centralized agencies in which all power was reposed without limitation was also behind constitutional restraints upon legislation. Such restraints imposed by fundamental law had been preached by Coke and admitted by Holt. One cannot wonder that this doctrine was received in America and put in the bills of rights after independence when he reads the high-handed statutes, interfering with every sort of individual conduct and belief and teaching of which the colonial legislatures were continually guilty, or the statutes probating wills rejected by the courts, dictating the administration of particular estates, suspending the statute of limitations for a litigant in a particular case, and exempting a particular wrongdoer from liability for a particular wrong for which his neighbors would be liable, with which colonial statute books are filled. Indeed, it was not without some struggle that the courts enforced the constitutional separation of powers against such lawmaking. I have seen these statutes cited to show that our forbears believed in omnicompetent legislatures and all-embracing regulation. But I submit that the bills of rights and the early cases under state constitutions affirming restraints upon legislative power show that they did not. The polity proposed by some, in which there is to be a fourth department, the administrative, in which full legislative, administrative, and judicial power is to be concentrated, is a reversion to the seventeenth and eighteenth-century type of absolute government,

on the model of the old regime in France, and to the type of government in colonial America which led to the Revolution.

Let me repeat. I am not attacking administration as a means of government in the society of today nor deploring the rise of administrative justice and delegation to administrative agencies of rule making, application of standards, or determination of facts necessary to the exercise of their functions. But administration is not all of the ordering of human relations. We may pay too high a price for efficiency. We must pay a certain price for freedom; and a reasonable balance between efficiency and individual rights is that price. If the balance does not leave absolute power to administrative agencies, it does not follow that it may not leave them enough power to function intelligently and effectively under a government of laws and not of men. I grant that a government of law must yet be a government of men. Laws govern as they are applied by men. But they may and should be applied by men according to law. Ideas of a fourth department, set up by legislation, come partly from study of the English polity since 1688 as something inhering in the nature of political theory, and partly also from the effect of French treatises on administrative law which hand down a tradition of administrative independence and administrative review derived from the old, pre-revolutionary regime. We have no need of turning to either for guidance. In an age of absolute governments we showed the world the possibilities of a free people ruling under law.

We are in no wise bound to concede that our legal political theory is logically and philosophically untenable. The proposition that it is logically unsound depends upon a postulate as to the nature of government which we have denied from the beginnings of legal and political thought in the New World. Even if we accept the proposition of skeptical relativism that starting points are not demonstrable, the postulate that government must mean absolute government is one of those undemonstrable starting points. American lawyers have often been reproached for assuming that the constitutional polity under which they were brought up was a legal political order of nature. But Continental publicists assume with no more warrant that a theory derived from Justinian's law books and developed by the lawyers of the old regime in France must be a necessary starting point in a science of politics. At any rate, the American lawyer may invoke the pragmatist criterion. Our theory has worked—to adapt the answer of Diogenes, *solvitur gubernando*. Continental European theories have yielded no such results.

ADMINISTRATIVE PROCEDURE

LECTURE III

IT is for others to discuss the general principles of administrative procedure as procedure before administrative boards and agencies in the exercise of their typically administrative functions. A lawyer can claim no special competence as to that subject. What chiefly interests lawyers, and what they have some competence to discuss, is administrative procedure in the exercise of the determining or, as it is called, quasi judicial function of administrative agencies, the methods used by such agencies in the exercise of that function, and the procedure of holding them to due process of law through judicial review. For there is more than one kind of function committed to administrative agencies just as more than one kind of function is committed to courts. In a court the primary function is one of determining controversies. This involves finding of facts, finding of law, and application of law to facts. But the finding of applicable law, using law in the sense of authoritative precepts to be developed and applied by an authoritative technique, involves also a certain creative declaratory function. This creative law-finding or lawmaking is, however, as Mr. Justice Holmes put it, interstitial. It is essentially a power of applying the

authoritative starting points for legal reasoning to new situations of fact, not one of constructing wholly new starting points. Courts act on premises by applying an authoritative technique. It is for legislatures to set up new premises or act without premises or even without technique.

Courts, in our system, have also, for historical reasons, certain administrative functions, functions of doubtful classification which have been devolved upon them as a matter of history. Examples are the administration of trusts, visitatorial jurisdiction over charities, administration of estates of decedents, guardianships, receiverships, and the winding up of corporations. If we speak of the determining function exercised by administrative agencies as "quasi judicial," we might equally speak of the foregoing heads of jurisdiction, as exercised by courts, as "quasi administrative." In the present century we have been having to learn that all the powers confided to courts cannot be exercised in exactly the same way; that the administrative element in a court's jurisdiction cannot be exercised mechanically as the jurisdiction with respect to title to property or collection of debts can be and requires to be. We now recognize that beyond certain fundamentals of just disposition there have to be differences of procedure even if carried on according to characteristic judicial method. On the other hand, if jurists have had to learn this, the student of administration has likewise to learn that all the powers confided to administrative agencies are not for that reason to be exercised in the same way.

There is a directing function, a function of directing in advance of controversy or of injurious action or neglect and so as to prevent controversy; there is a function of inspecting for the special purposes of such directing; there is a function of investigation for general purposes of directing the conduct of enterprises and the like. Here we are dealing with a primary function of administration. There is a certain function of finding the applicable law, incidental to applying statutory rules and standards. Also there is a function of determining, of finding the facts to which rules and standards are to be applied and of ascertaining on that basis the rights of parties to be affected by administrative orders. The two last are incidental and are commonly said to be quasi judicial.

In addition, both courts and administrative agencies have an incidental rulemaking power with respect to the details of procedure, and administrative agencies are commonly given by statute a power of making rules for carrying out into detail the general statutory prescriptions of rules and standards.

There are those today who tell us that, at least so far as administrative agencies are concerned, these functions cannot be distinguished. It is true that no rigid, analytical distribution among distinct functionaries is expedient, even if it were possible. But the methods appropriate to exercise of the several functions are distinct and must be so under any but an autocratic polity. When we are told by a leading advocate of administrative absolutism that "little or no assistance is to be derived from an analysis of the distinction be-

tween administrative and judicial functions," what is really meant is that from his postulate the separation of powers which is at the foundation of our American constitutional polity cannot be maintained. An absolute parliament having succeeded to the Stuart attempt to set up an absolute monarchy, an absolute administrative hierarchy is the next step. For valid reasons, based upon experience in our colonial era, we took another course and are not bound to accept his postulate. The methods of administration, on the one hand, and of adjudication, on the other hand, have been distinguished in the common-law world if not entirely in the Roman-law world. Indeed, the French setting up of administrative tribunals, which are in effect courts, recognizes the distinction.

Apart, however, from the distinction of methods appropriate to different functions, it is of special importance to take account of the checks upon courts which do not obtain or in our practice are ineffective as to administrative agencies. Four of these checks are significant. In the first place, in a court the judges from their very training are impelled to conform their action to certain known standards and to conform to settled ideals of judicial conduct. Professional habit and training lead them to hear both sides of every point scrupulously, rules of law which have entered into their everyday habits of action lead them to insist that everything upon which they are to base an order or judgment must be before them in such a way that no party to be affected can be cut off from full opportunity to explain or refute it or challenge its application to his case.

Judges in court are impelled in every case to seek authoritative grounds of decision before acting and to base their action upon reasoning from such grounds. Again, the decision of a court is subject to criticism by a trained profession to whose opinion the judges, as members of the profession, are keenly sensitive. Thirdly, every decision and the case on which it was based appear in full in public records. In those records any one may find exactly what the claims of the respective parties were, what disputed questions of fact and law were before the tribunal and how the questions of fact were determined—if by a jury very likely by questions put by the court and specifically answered, if by a judge, in the form of special findings of fact. Likewise, anyone can find from those records what conclusions the court came to as to the applicable law, either in the form of instructions to the jury or of findings by the court. Moreover, the judgment of the court must respond to the pleadings, findings of fact, and conclusions of law, and any lack of consistency in these respects will be apparent on the face of the record. Fourthly, every judgment of a single judge is subject to review by a bench of judges, independent of the one whose action is to be scrutinized and constrained by no hierarchical organization or *esprit de corps* to uphold whatever he does. Nor is this all. In the case of appellate courts all important decisions and the grounds on which they proceed and the reasons on which they proceed are published in the law reports. The opinions must be based upon the records in the cases decided, and those records are public records accessible to every

one. Thus the materials for criticism of and accurate judgment with respect to judicial decisions are always available and readily accessible. There are no such checks upon administrative action.

Let us make a comparison. Those who sit in administrative determinations seldom have had experience of the deciding function. The expertness demanded of them is of quite another sort. They are likely to have the layman's idea that decision is an easy task involving no acquired expertness through training and experience and to be conscientiously unconscious of what the lawyers soon learns, namely, that there are two sides to every case. Without training in grounding their action upon certain known standards, they are prone to act in deciding, as very likely they properly may in directing, as if every case were unique. Again, the number of those who are competent to criticize administrative determinations, as distinguished from the general course of administrative action, if we leave lawyers out of account, is at least very limited. They are not necessarily members of a common profession with the administrative officials and the latter are not unlikely to consider their criticism and that of lawyers negligible. Thirdly, administrative determinations are not safeguarded by the detailed and explicit records which keep down any tendency of a court to act otherwise than impartially and objectively in arriving at its determinations and enable lawyer and layman alike to know accurately what has been done and how and why. Fourthly, as will be shown presently, review of administrative determinations by an administrative official

is a very different thing from review of the action of a judge by an independent bench of judges.

What are the checks which are claimed to operate upon administrative determinations? The best discussion of this subject finds no less than six. First, we are told is "the fact that that process, as distinguished from the judicial process, moves in a narrow field." Hence, it is said, "the administrative is not open to the broad range of human sympathies to which the judicial process is subject." But is this a check at all, or is not rather the confining of determinations to a highly specialized field apt to lead to looking at all things from the standpoint of that narrow field and so to ignoring one side of disputed questions of fact in view of supposed exigencies of that field, a fault which we shall see is unhappily very common in administrative determinations? Second, it is said, "singleness of concern quickly develops a professionalism of spirit—an attitude that perhaps more than rules affords assurance of informed and balanced judgments." But does the professionalism which grows from preoccupation with a single type of controversy afford the check that is to be found in long continued occupation with controversies of every type, with a background of experience of generations of judges in determining all kinds of controversies, affording not merely skill in bringing out all sides but caution in assuming that any contention of any one affected may be ignored? I submit that this preoccupation with a narrow field is one of the chief reasons why effective judicial review of administrative determinations of fact, to hold them within limits of due process

of law, is urgently demanded by lawyers. Third, we are told, that normally there is a check in the requirement of findings of fact necessary to support an order; "findings of fact that must be both detailed and informative." Where statutes make this requirement and there is effective procedure for enforcing it, there is a real check. But statutes do not always make such findings a condition, the procedure for judicial review too often does not enable it to be made effective, and what detracts most from the efficacy of the check, there is often no effective means of assuring a proper basis for the findings in evidence of rational probative force after a full hearing of all sides and opportunity on the part of all persons affected to explain, refute, or challenge everything that is to be used in arriving at an adverse finding. A fourth check is said to be in the relationship of adjudication to policy—the adjudication must promote the policies of the administrative agency and its policies must promote the industry or activity subject to control. Experience shows that so far from being a check, here is in part a source of one of the most flagrant abuses in administrative determination, namely, determination of facts not on the basis of hearing and evidence, but on the basis of preconceptions of facts to fit the assumed exigencies of a policy. One might in this connection refer to more than one finding of the National Labor Relations Board. But many examples which are no longer controversial may be found in findings of prohibition administrators under the National Prohibition Act. A fifth check is said to be promised by a tendency to divorce the administra-

tive process "from a too obvious connection with the executive" by setting up independent tribunals. But administrative agencies have not the constitutional guarantee of independence which the courts have. Their independence, if any they have, is dependent upon the legislature and the executive, not co-equal with that of legislature and executive. Finally, sixth, the author cites the right to judicial review; but he hastens to add that the tendency has been to narrow judicial review and limit the checks that now exist.

What I am speaking of is checks upon exercise of the determining or adjudicating function. More than one of what are asserted as checks are checks upon the general exercise of the directing and investigating function. At most they could only operate incidentally upon the methods of determining the rights of parties affected and the facts upon which those rights depend. Some of them, as has been seen, operate to bring about the abuses in determination which checks are needed to correct. It must not be forgotten that the advocates of administrative determination free from judicial scrutiny consider that the administrative process must be taken as a whole and hence the way in which determinations are arrived at is negligible. It is argued that, notwithstanding our constitutional organization of government, there may well be a "fourth branch of the government" uniting all the powers in one body. It is quite true that there is no magic virtue in the number three. But it is the separation or distribution of powers that is the significant feature of our constitutional polity, and a concentration of them in a fourth

is objectionable, not "in the light of numerology" but because it brings back the type of government that our constitutions were set up to avoid.

How completely the exercise of the powers of administrative agencies is left at large, as compared with those of legislatures and courts, is well illustrated by their rule-making power. Administrative rules and regulations having the force of laws have become an important part of the everyday law in nation and state. Often these rules affect interests of far more economic significance to individuals than statutes or rules of court. Yet even the least significant statute must be formally introduced as a bill, printed, referred to a committee and reported on, often after hearing, read three times before each house, discussed in committee of the whole, passed by each house and approved by the executive. Rules of court are drafted by committees of judges, practising lawyers, and law teachers, or by judicial councils, referred for criticism to bar association committees or to committees of the bar in the different circuits, discussed before bar associations and in the legal periodicals and only adopted after every one having an interest has been fully heard. Administrative rule-making is in striking contrast. The first knowledge that those affected have of a rule is usually after it has gone into effect. The first opportunity they have to challenge it is usually after it is enforced against them and they can attack it in the courts.

But, it will be said, why do we need checks upon exercise of the powers of administrative agencies? We are told that "political development represents a pic-

ture of increasing reliance by our society upon the administrative process." Hence, it is argued, we must look at these things "against a background of what we now expect government to do." It is not, however, wholly a question of what we expect government to do, but also one of how we expect government to do it. As has been said, there is a tendency in administrative agencies to see the particular, relatively narrow, task of the particular agency out of proportion. This tendency, to take an example which is no longer controversial, was manifest under the regime of national prohibition. Those who were in charge of the National Prohibition Act felt strongly, and no doubt conscientiously, that the objects of that act were of such paramount importance as to justify extra-legal measures and overriding of individual rights and constitutional guarantees. They looked only to what we expected the government to do. Zeal in carrying out laws, which are felt by those chosen to administer them as of paramount importance, justifying the means by the end, is one of the reasons why the constitutional polity under which we live is by no means obsolete. The fundamental features of government it was set up to deal with are as much in need of restraint today as they ever were. In a constitutional legal polity all exercise of the power of politically organized society calls for checks. That checks are peculiarly needed with respect to administrative adjudication is made clear by consideration of certain tendencies which may be seen in administrative action not merely in our administrative agencies, federal and state, but in like agencies

in England and in the British dominions generally.

Most serious among these tendencies is one going counter to what has always been the first principle of judicial justice—*audi alteram partem*, hear the other side. In administrative adjudication there is an obstinate tendency to decide without a hearing or without hearing one of the parties, or after conference with one of the parties in the absence of the other whose interests are adversely affected. Examples from the latest of our state law reports are: Central Bus Operators, Inc. v. Central Ave. Bus Owners' Assn. 128 N.J. Eq. 177 (1940) —deprivation of a substantial property right without affording an opportunity to be heard in defense thereof; Wolgamut v. Vinegar Hill Zinc Co., 151 Kan. 374 (1940)—order made without notice to a party affected; Matter of Lipschitz v. Mealey, 259 App. Div. (N.Y.) 640, 642 (1940)—taking testimony of two witnesses in the absence of the party affected and without any opportunity on his part to cross examine; Darby v. Southern R. Co., 194 S.C. 421, 441 (1940)—Public Service Commission held bound to have a hearing before exercising discretion as to what type of service to require a railroad company to render; Atchison, T. & S. F. R. Co.'s Protest, 44 N.M. 608, 614 (1940)—decision on a partial hearing. Very recent cases involving federal administrative agencies are: Scripps Howard Radio, Inc. v. Federal Communications Commission, U.S.C.A. D.C. Feb. 3, 1941—orders injuriously affecting valuable rights made without hearing the parties affected and application for hearing thereafter denied; Brown Radio Service & Laboratory v. Federal Communica-

tions Commission, U.S.C.A.D.C. Feb. 3, 1941—see the arbitrary denial of hearing set forth in note 1 to the opinion of Stephens, J. Significant English cases are Rex v. Housing Appeal Tribunal [1920] 3 K.B. 334, 342, 344; Cooper v. Wilson [1937] 2 K.B. 309, 345; Errington v. Minister of Health [1935] 1 K.B. 249, 280-281. A significant Australian case is In re Evans, 52 New South Wales Weekly Notes, 1 (1934)—administrative Court of Marine Inquiry cancelled a pilot's certificate on the basis of a reconstruction of maneuvers of vessels in a collision, in the absence of the pilot and without his knowledge. How obstinate this tendency is finds illustration in Saxton Coal Mining Co. v. National Bituminous Coal Commission, 96 Fed. 2nd, 517 (1938) where although the statute required a hearing the commission made orders without notice or hearing and sought to obtain a ruling from the court that notice and hearing were not necessary as the basis of its orders.

An example of how laymen are likely to proceed in this way may be seen in Brooks v. Engar, 259 App. Div. (N.Y.) 333 (1940)—expulsion of a member of a voluntary association on the testimony of a witness whose identity and testimony were withheld from the member expelled.

A closely related tendency is to make determinations upon the basis of consultations had in private or of reports not divulged, giving the party affected no opportunity to refute or explain. Examples in the latest state reports are: Matter of Smith v. Rosoff Tunnel Inc., 259 App. Div. 617, 619-620 (1940)—acting upon a private consultation of the medical staff, precluding

all cross examination; Wallace v. North Dakota Workmen's Compensation Bureau, 69 N.D. 165, 169-170 (1939)—refusal to allow examination of the papers on which an order terminating an award was based. A significant English case is Errington v. Minister of Health [1935] 1 K.B. 249, 280-281. Typical cases in the federal courts are: Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88, 93 (1913); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 300-301 (1937)—withholding of evidence on which the commision acted and refusal to reveal it, concealment of the evidential facts on which the commission purported to take judicial notice of the information on which it acted (strong opinion by Cardozo, J.); Morgan v. United States, 304 U.S. 1, 14-15, 17, 19-20 (1938)—action on the basis of findings which the parties affected were not given opportunity to examine (strong opinion by Hughes, C.J.); Tri-State Broadcasting Co. v. Federal Communications Commission, 96 Fed. 2nd, 564, 566-567 (1938)—action on report as to what "a large number of people" had said, with no opportunity of cross examining those whose opinions were received at second hand. As Professor Wigmore has put it, a special danger of infraction of the "fundamental rule" requiring disclosure to a party of what is to be the basis of an order affecting him "is found in proceedings before administrative officials." (9 Wigmore, Evidence, 3 ed. § 2569.)

In the Morgan case Chief Justice Hughes pointed out that "the requirements of fairness are not exhausted in the taking or consideration of evidence but

extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." In contravention of this elementary principle of just procedure there is a practice by no means uncommon in administrative determinations by which after there has been a hearing and taking of evidence and report by some subordinate or appointee of the administrative agency, the body having authority to make the decision and order does so not upon the full record itself but upon an abstract made for it by one of its subordinates. One can well understand that a busy board or commission ought not to be asked to read all of a mass of testimony running perhaps to thousands of pages. Appellate courts very generally act upon abstracts of huge records. But there is a significant difference. The abstracts used in court are made by the parties and contain what each party deems necessary or proper to present his side of the case. If the trial judge deems more necessary he may have it included. The abstract then becomes part of the record and is open to use by both parties. On the other hand, the abstracts used by administrative agencies are not made by the parties, do not contain what the parties regard as needed to make out their contentions and do not become part of the record. It is obvious that the making of such an abstract by a subordinate may easily be decisive of a case, with no opportunity in the party affected to know or show on what basis his contentions were defeated.

It is important to note how obstinately persistent these tendencies are. In Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88, 91, 93,

the government insisted, in the face of a prior decision of the Supreme Court of the United States, that an order fixing rates was conclusive and could not be set aside even if based on no evidence. In Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 300, the commission sought to avoid the prior decisions of the court and claimed power to decide upon matters not brought to the notice of the party affected, basing its claim on extravagant assertions of a power of taking notice of the facts necessary to sustain its order. But a year later we find it strenuously contended on behalf of an administrative agency that it can accept and make as its own "the findings which have been prepared by the active prosecutors for the government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims presented and to contest them." (Morgan v. United States, 304 U.S. 1, 22.)

No less serious is a tendency to make determinations injuriously affecting individual rights without a basis in evidence of rational probative force. This tendency has appeared in many of the cases already cited. For an example, in the reports of the current year, I may cite Taylor v. Cornett Lewis Coal Co., 281 Ky. 366, 368 (1940). The question was whether an employee had accepted the provisions of a statute. His name was not on the registry of those who had accepted, but there was a report of the accident in question made to the board, upon its repeated insistence, in which it was positively stated that the employee had not accepted.

On the sole basis of the employer's having reported the accident, the board found that the employee had accepted the provisions of the statute. The reports are full of such cases.

A tendency no less widespread, but much more difficult to reach by judicial review under the statutes and procedure of today, is one to set up and give effect to policies beyond or even at variance with the statutes or the general law governing the action of the administrative agency. It is very easy to say that the public interest demands or justifies activity beyond or in contravention of the statute and to cover this up by a general pronouncement upon the case. Usually this is done out of zeal to promote social ends to which the legislative body might or might not agree. It involves a degree of legislative power in administrative agencies which is not given them and ought not to be given them. Late examples from the current reports are: Motsinger v. Perryman, 218 N.C. 15, 21 (1940)—an attempt to create liability where the law imposed none; In re Atchison, T. & S.F. R. Co.'s Protest, 44 N.M. 608, 613 (1940)—exercise of powers not given; Puhl v. Pennsylvania Public Utilities Commission, 139 Pa. Super. Ct. 152, 158 (1939)—commission sought to impose conditions not warranted by the statute.

That these tendencies of administrative determination are not a matter of occasional sporadic cases but represent an inherent and deep-seated characteristic of lay administration of justice, is shown by the number of cases to be found in the reports in all jurisidictions and the persistence with which the same abuses

appear for years after the courts have called attention to them. It will be noted how many cases are found in the one volume, 259 App. Div. covering March to August, 1940. Such things call for effective judicial review and explain the activity of the American Bar Association (whose members have continual experience of what these tendencies in action mean to their clients) in seeking a modern appellate procedure for appeal from administrative orders and effective safeguards as to record, hearing, and findings. Indeed, these tendencies seem to be so much involved whenever administrative justice is reposed anywhere that our appellate courts have had to repress them where administrative powers have been given to lower courts, especially to single judges in new types of court with large grants of discretion. A recent example may be seen in Interdiction of Scurto, 195 La. 747, 750, 751 (1940)—judge acting on supposed personal knowledge in appointing a guardian without notice or hearing. The law is careful to provide a series of checks upon such judicial administration and afford the fullest review before a bench of judges. How much more is effective judicial review called for in the case of lay administrative tribunals. The modes of review provided by statutes, often differing for each agency, make review of administrative determinations difficult to obtain, and operate to render review beyond the reach of many whose interests are injuriously affected. This is common knowledge among lawyers and it is this knowledge which has led lawyers to urge a simple uniform procedure for review. As the foregoing examples show, the

matter is wider than one of purely federal concern. A wise federal statute, affording a model for state legislation, would be a long step forward in our administration of justice.

For examples of statutory limitations of review, see Brown Radio Service & Laboratory v. Federal Communications Commission, U.S.C.A.D.C. Feb. 3, 1941—statute providing no power of review because of injury to private interests but only where there was injury to public interest; Scripps Howard Radio Inc. v. Federal Communications Commission, U.S.C.A.D.C. Feb. 3, 1941—statute precluding stay of orders made without a hearing which injuriously affected valuable rights.

What, aside from the claims of administrative absolutism, are the arguments against providing by statute, or by statutory provision for rules of court, for an adequate procedure for judicial review and requiring adequate records and findings? Some say that administrative procedure should be left to develop in the course of administrative decision and experience of each agency, and the measures advocated by the American Bar Association have been compared to elaborate codes of procedure to which the lawyer of today justly objects. No lawyer doubts that the details of administrative procedure should develop out of experience just as the details of judicial procedure should. But there are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding. Lawyers are not seeking to tie administrative agencies down by a mass of detail, as so many courts were tied down by statutes and codes a genera-

tion ago. What they seek is to secure the basic requirements of just determination of facts and sound application of law.

Nor is there any real point in the argument frequently made from the great variety of administrative agencies and of the subjects committed to them. There is no variety in the characteristics of administrative determination which call for the safeguard of effective judicial review. There is something to learn from the history of judicial review of proceedings in the courts. In the beginning there was a tendency to have a distinct type of review for each type of judicial proceeding. In an action at law there was once a distinction between application for a new trial and bill of exceptions followed by writ of error. There was error at law, appeal in equity and admiralty (not with the same procedure, however, in both), appeal with retrial to a jury in cases in inferior courts, and certiorari for proceedings not according to the course of the common law. There were resulting difficulties and complexities and technicalities which we have been eliminating for a generation. Now we are coming to a simple appeal for all cases calling for review. Administrative law has been going through a like development. We ought by this time to have learned that a simple uniform procedure for review may be adapted by rules of court to every sort of case.

Again, many have argued that a simple, non-technical, inexpensive, and speedy mode of review of administrative determinations would result in casting an intolerable burden upon the courts. But such a meas-

ure as is advocated by the American Bar Association for federal administrative determinations does not mean that every federal administrative proceeding with which any one is dissatisfied will be heard *de novo* in the courts. One might as well say that the possibility of appealing final judgments at law entails hearing in the higher court *de novo* of every case brought in the courts of first instance. Only a small proportion of judicial proceedings, in which there is ground of appeal, is taken up. As to administrative determinations, where the aim is only to insure fundamentals, without substituting discretion of the court for that of the administrative agency, the proportion would be much smaller. But it should be noted that appealability of its decisions is a great check upon a tribunal. When an effective proceeding is available for review, adequate to protect the essentials of a just procedure and the guaranteed rights of individuals affected by administrative orders, the cases of methods and courses calling for review will greatly diminish. The cases which will go to the courts, except in relatively rare instances, will be those involving the interpretation and application of statutory provisions.

A common type of argument decries effective judicial review as imposing legalism upon administrative agencies. We are told that it is characteristic of administrative tribunals that simple and non-technical hearings take the place of trials, that a common-sense resort to usual and practical sources of information takes the place of archaic and technical rules of evidence, and that an informed and expert tribunal renders decisions

which look forward to results rather than backward to precedents. No one urges that an administrative hearing or investigation be conducted in all respects as a trial at law. No one today objects to any reasonable informality or application of common sense to the ascertainment of facts. What is objected to is the tendencies heretofore discussed which ignore what long experience has shown to be fundamental in justice. To say that these elementary requirements of justice are technical "legalism" and that seeking to make available to all who are adversely affected the constitutional guarantee that a decision against them shall have a basis in evidence of rational probative force and not in prejudice, preformed opinions without hearing the other side, gossip, and made-to-order interviews under the name of investigation, is insistence on "technical rules of evidence," is simply to say that all rights are to be at the mercy of administrative agencies. Looking forward to results on the part of an informed tribunal, if the tribunal, as has happened in the case of some recently, considers itself informed without the hearing that the statute creating it requires, is a looking backward to the methods of the administrative tribunals of the Stuarts.

To require administrative tribunals exercising a power of adjudication to keep within the limits of the jurisdiction and powers given by the statute creating them, to require these tribunals to take the policies they apply from the statute under which they sit and not from their own ideas of particular cases, to require them to apply the standard provided by statute instead

of making one of their own or acting on no standard, to require them to find the facts upon which they base their orders, as all other tribunals are required to do—all this is not legalism, it is constitutionalism.

Back-handed review of administrative action by injunctions and suits analogous to bills of peace gave ground for claim that judicial review substituted the discretion of the court for that of the administrative agency. Unhappily, in some jurisdictions and under some statutes those expensive and dilatory proceedings are the only available modes of insuring due process of law. But the remedy is not to turn administrative agencies at large to fix their own powers, proceed in disregard of constitutional guarantees, and make their own law for themselves. It is rather to require records and provide a mode of reviewing them which will reach the tendencies of such tribunals requiring checks without interfering with their legitimate discretion.

Those who argue for administrative absolutism assume that an administrative board or commission or bureau will be an independent, expert body. But there is no assurance of independence and in the great variety of administrative agencies the expert element varies much. Recent experience shows that it is by no means easy under the pressure of politics to maintain the independent bench which our constitutional polity requires. Yet the judges are given a high degree of independence by constitutional guarantees of their tenure and their salaries and the permanence of the courts in which they sit. There is no such assurance of independent boards and commissions. Any change

of administration, any new Congress or legislature may bring about reorganization, consolidation with other agencies, abolition, change of personnel, or cutting off of appropriations. Hence administrative agencies are largely at the mercy of the legislature and under the control of the executive. They are not unlikely, as experience has shown, to overrule their experts or dictate their experts' conclusions. Undoubtedly independence of such agencies, equal to that of the courts, is highly desirable. But it is not likely to be realized under the political conditions in which it must be achieved.

Some have urged special administrative courts of appeal as part of the administrative hierarchy. But this proposition is open to two objections. If a general administrative court of appeal were a real court, it would prove no more acceptable to the proponents of administrative absolutism than the ordinary courts. If it were not, it would confront us with the tendencies of lay tribunals which call for review and would be unnecessary. Moreover, multiplication of courts is objectionable. The general course of development in legal history has been to set up a multitude of specialized tribunals and then gradually consolidate them into a simple, unified system. There is a tendency to set up specialized tribunals in the beginning of any new development in law. The pressure some years ago for a specialized administrative appellate tribunal was a manifestation of that general tendency. Happily, we hear no more of it.

One of the difficult subjects in American administra-

tive law arises from the uniting of investigation, prosecuting, and adjudication in one body. Members of legislative bodies have often borne witness that their constituents expect them to forward complaints to administrative agencies which are authorized to receive the complaints, investigate, institute what is in effect a prosecution, through its subordinates act as advocate of its prosecution before itself, act as judge and enforce its judgment. Thus the proceeding from beginning to end may be one to give effect to the complaint. Such things are in manifest derogation from the maxim that no one is to be judge in his own case. A recent case in which a court noted the effect of the administrative agency's acting as investigator, prosecutor, advocate before itself, and judge is Matter of Joyce v. Morgan, 259 App. Div. (N.Y.) 630, 635 (1940). That there is a very serious evil here is generally admitted. How to correct it through the organization of administrative agencies is something beyond my competence to discuss. But authorities on administrative organization seem to feel that the uniting of these roles is to a certain degree inevitable and not without compensating advantages. If so, there is the more reason for effective judicial review. We have a situation not unlike this in the case of contempt where not a matter of executing decrees or enforcing order in court. Every consideration that has called for checks and judicial review in contempt cases applies equally to prosecution of complaints by an administrative agency before itself.

As the practice stands, procedure to review administrative determinations takes on many forms. It has

grown up haphazard by statutory additions to and judicial development of certain common-law and equitable remedies. The common law allowed direct attack upon administrative action by certiorari, mandamus, and prohibition. In our colonial era appeal from the administrative action of magistrates to a court and hearing *de novo* before a jury was employed and some such proceeding still obtains in some states as to certain administrative proceedings. Some states extended the common-law writ of error or statutory modifications of proceedings in error to certain forms of administrative action. In equity, the bill *quia timet* and bill of peace were extended to certain forms of administrative action and the visitatorial jurisdiction of equity was used as to municipal administration. Statutes have made every sort of provision for review as to particular administrative agencies, prescribing appeal, or certiorari, or prohibition, or suit in equity, with no system, choosing one form for this statutory agency and another for that, with little attempt at uniformity. In truth, statutes have often sought more to cut off judicial review or greatly restrict it than they have to make it effective within the range of the constitutional guarantees which require it. As Dean Stason has said the statutory remedies are "part of a statutory chaos, a heterogeneous confusion of ill conceived and badly drafted provisions, grown more or less like Topsy and badly needing scientific attention." It is sometimes difficult to know the proper remedy. For example, in Drummey v. State Board of Funeral Directors, 13 Cal. 2d, 75, 78 (1939) in order to procure review of an

administrative order the parties affected applied for "writs of review" and then amended seeking review or mandamus or prohibition. The state reports are full of such cases of doubt how to proceed. In some states the distinctions are still so technical that resort to the available remedies is discouraged. In others it is often far from clear how far common-law and equitable remedies are superseded. In one of the larger states, we are told, "it seems to have become the common understanding among attorneys, when confronted with one of these propositions, that the thing to do is to see the right person or to take it up through political channels rather than to resort to the inadequate and cumbersome legal procedure which is available."

In the legislation needed to correct this situation, four points above all should be insisted on:

(1) That both sides and all persons injuriously affected be heard fully before orders and determinations are made against them.

(2) That nothing which is to be used as the basis of an administrative determination adverse to a party's interest be withheld from his scrutiny so as to deprive him of full opportunity to explain or refute it, and nothing used in arriving at the determination be withheld from the record for review.

(3) That whenever determinations are made injuriously affecting individual interests, findings of fact and a record, showing fully and clearly on what they are based be required so as to make review possible and effective to insure that the findings have a basis in evidence of rational probative force. The process of

arriving at a decision in a quasi judicial proceeding is well described by Stephens, J. in Saginaw Broadcasting Co. v. Federal Communications Commission, 96 Fed. 2d, 554, 559-560 (1938). A record which will insure such a process ought to be required.

(4) That a simple procedure be provided by which orders and determinations may be reviewed to determine whether there has been a full hearing of all sides, whether the facts in dispute necessary to a decision have been found, whether the findings have support in evidence of rational probative force, whether the order or determination is in accord with the statute governing it, rightly interpreted and applied, and whether the administrative agency has applied according to law the standard committed to it by statute or has applied a different one (perhaps of its own making) or has acted upon no standard.

The alternative is the redress by appealing to "the right person" or taking the matter up "through political channels" that is too well known in many localities, to which, indeed, the methods and traditions of administration, as contrasted to those of adjudication, lend themselves too much.

THE FUTURE OF JUDICIAL JUSTICE

LECTURE IV

IN the foregoing lectures I have assumed the characteristic English and Anglo-American institutions, an independent judiciary and the supremacy of the law. I have assumed the characteristic American development of those institutions, a judicial justice which tries all acts of everyone, private individual and public official alike, by the measure of the law of the land and holds to the bounds of reason every act of any person or body of persons entrusted with exercise of the power of politically organized society. But can one assume such things for America of tomorrow? In the cycle of events the world has been swinging round again to absolutism; to the autocratic ideas of the later Roman empire, of the old regime in France, and of the seventeenth and eighteenth-century governments on that model. Are we also to be caught up in this general movement? Are we to give up our quest of justice through law, our plan of government measured by reason rather than government of unlimited force, our faith in judicial justice, attained after full and fair hearing of all, grounded on findings established by evidence, and directed by principles derived from experience and tested by reason?

ADMINISTRATIVE LAW

Nineteenth-century jurists regarded law, in the sense of a body of authoritative grounds of or guides to decision, developed and applied by an authoritative technique on a background of authoritative ideals, as a deduction from Kant's formula of justice. Hence to them law was logically necessary to the administration of justice. But social control is not of necessity constrained to carry out Kant's formula. Social control through the pressure exerted by politically organized society through its tribunals may be exercised by dealing with causes, adjusting relations and ordering conduct, according to the will of the individual or the body administering justice in the time and place, or it may be exercised according to law. Because the former is not only quite possible but the phenomenon is actually observable, there are those who, in reaction from exaggerated pronouncements of the nineteenth-century theory, define law as whatever is done officially. Oriental justice of the type we read of in the Arabian Nights, the administration of justice by a medieval king in person, martial law—as the Duke of Wellington put it, "the will of the general who commands the army"—however much guided in a general way by custom or current morality or considerations of humanity, have the characteristic features of summary, impulsive action, without hearing both sides, without calling for evidence of rational probative force, and without consideration beyond the case in hand, which mark what we may fairly call justice without law.

Just as ethical custom, morality, and the opinion of the community as to things not to be done, operate to

give a certain amount, greater or less, of consistency and stability to justice without law, so like considerations of ethical custom, morality, humanity, and community opinion operate to give a certain amount of flexibility to justice according to law. Four phases of this justice without law, i.e. justice without constraint by authoritative precepts applied by an authoritative technique, must be noticed. One is personal as distinguished from judicial discretion, that is, a power in the magistrate of acting in certain cases according to his own judgment and conscience, uncontrolled by any authoritative guide. Here the magistrate's action is within the legal order but without law in the older sense of a body of authoritative guides. Again, some of the Continental codes authorize a court to decide the case in hand under certain circumstances by the measure of "natural justice." This is not as much at large as personal discretion. There must be a reasoned decision. Still there is not a little scope for personal feeling. In our law there is the measure of "equity and good conscience," applied in granting or denying an injunction on the balance of convenience or in denying specific performance in case of a hard bargain. The nineteenth century tended to reduce the margin of discretion in such cases to a minimum, but that margin is still considerable. This is called judicial as distinguished from personal discretion. It is governed to some extent by principles, i.e., by authoritative starting points for reasoning. In continental Europe there is what is called *aequitas,* a magisterial wielding of the royal dispensing power by relaxation of rules with

reference to the requirements of individual cases under certain circumstances. These tempering or mitigating agencies operate especially on the administrative side of judicial justice. The last century tried hard to hold them down very tight and would have liked to eliminate them entirely.

Legal history shows that administration of justice has at times relied upon precepts and authoritative technique of applying them and at other times upon wide discretion, even of the personal type. This difficulty as between justice according to law and justice without law, goes back to a fundamental problem of the science of law, namely, the balance between the general security and the individual life, and in consequence between stability and change. The general security demands not only a peaceable ordering of society, but certainty and uniformity of judicial action in that ordering. Strict rules and overrigid dogmas may sometimes hinder the strong judge and stand in the way of the best solution of which he is capable. But they are a security against well meant ignorance of the weak judge and improper motives on the part of those who make determinations on which rights depend. Even where detailed rules are impossible from the nature of the case, we cannot leave tribunals wholly at large. There must be something more to guide the course of justice than a general reference to the social standard of justice as the ethical custom of the community. Formulation of the experience of the past in standards is especially important because no judge and no bench of judges can be expected to have had a tithe

of the experience which those standards involve and make available. It is not possible for a tribunal with a great mass of litigated cases before it to work out these formulas independently for each controversy. Moreover, after controversy has arisen is a bad time to make a rule. Then the partisan claims involved are likely to warp the determination. It is a great advantage that the law provides authoritative grounds of decision and an authoritative technique of developing and applying them, in advance of controversy and thus affords an effective check to the natural human impulse to yield ultimate advantage to apparent present advantage.

Yet there are considerations on the other side which we cannot ignore. Legal precepts are made for cases in gross and men in the mass and are intended to operate impersonally, which may mean more or less arbitrarily in particular cases. Law develops science and system, and there is always danger that those carry with them a tendency to make the authoritative guides to decision ends rather than means, and to attempt rules where rules are not practicable and invade what is the legitimate domain of justice without law. Moreover, since law formulates settled morality and ethical ideas, there is always a lag with respect to the more advanced conceptions in periods of transition. Yet this last is not wholly a disadvantage. Law moves with the main body, not with the advanced guard, and much in the reconnoiterings of the latter often turns out not to be in the line of final progress.

It must not be forgotten that law is something more than an aggregate of laws.

If we look only at the precept element, that element includes principles and conceptions and standards as well as rules, and the technique of developing and applying rules, principles, conceptions, and standards, and the received ideals in the light of which they are developed and applied, are as authoritative and as much part of the law, using law to mean the body of authoritative grounds of and guides to determination, as the rules themselves. It is true that some parts of the field of the legal order are adapted to administration of justice by rules attaching definite, detailed legal consequences to definite, detailed states of fact, and some are less so adaped and some are not so adapted. Inheritance and succession, interests in property and the conveyance thereof, matters of commercial law, and the creation, incidents, and transfer of obligations, with respect to which the social interest in security of transactions is especially strong, have always been fruitful subjects for legislation. Legislation prescribes rules and those subjects admit of justice according to rules. On the other hand, where the questions are not of interests of substance but of the weighing of conduct and passing on its moral aspects, legislation, justice according to rules, is less effective and in some situations is not practicable. But this does not mean that such subjects as torts, and the conduct of fiduciaries and transactions and relations of good faith, must be put outside the pale of the law. Long ago legal systems learned how to deal with such cases by means of standards, and, although the last century tried to reduce standards to detailed rules (as e.g., in the law of negli-

gence) the tendency in the present century is to extend the adjustment of relations and regulation of conduct by standards, while subjecting the application of them to principles, that is, authoritative starting points for reasoning derived from experience and tested by reason.

Most of the domain of the legal order which is being committed to administration is in the field where standards are called for rather than rules. But it does not follow that it is outside the proper field of law. It is only when law is regarded as no more than an aggregate of rules analogous to rules of property that this can be maintained. Standards may be applied either judicially or by administrative agencies. In either case they may be applied by a technique and in accord with principles which are part of the law. When we have set off part of the task of social control through politically organized society as appropriate for rules and another part as appropriate for standards, we have by no means settled anything as between judicial justice and administrative justice. The attempt in the nineteenth century to put everything in the mold of rules of property or sections of a criminal code and the analytical conception of law as an aggregate of such rules have given aid and comfort to the doctrine of the disappearance of law.

A generation ago it would have seemed pedantic to consider legislative and administrative justice in any discussion of justice according to law unless in the course of a sketch of the rise and evolution of judicial justice. Judicial justice to the metaphysical jurist was

a logical deduction from the fundamental idea of liberty. To the historical jurist it was a phase of the idea of liberty which was unfolding or realizing itself in human experience. Indeed, down to the end of the last century, the development of our legal system did seem to conform to the historical theory. In the sixteenth and seventeenth centuries it was settled for the common law that the king had no part in the administration of justice. As Coke put it, causes which concern the life or inheritance or goods or fortune of the subject were not to be decided by the natural reason of the crown but by the "artificial reason and judgment of the law," as pronounced by the courts. Sixteenth and seventeenth-century England had seen natural reason in action in the administrative tribunals of the Tudors and Stuarts. Seventeenth and eighteenth-century America had seen natural reason in action in the centralized, undistributed powers of the Privy Council and the royal governor and his council. England had turned to judicial independence, America had turned to a fundamental separation of powers and constitutionally guaranteed independent judiciary. Moreover, this course of development went forward in the nineteenth century. Legislative equity, private acts of parliament affording equitable relief against fraud, duress, and breach of trust, went out of use in England at the end of the seventeenth century. In the eighteenth century legislative criminal justice, acts of attainder and bills of pains and penalties, came to be regarded by English writers as vicious in principle and substantially obsolete. The abortive bill of pains and penalties

brought against Queen Caroline was the last of its kind. The action of Lord Lyndhurst in the O'Connell case in 1844 settled that the appellate jurisdiction of the House of Lords was to be exercised by the law lords only and so made a court where there had been a legislative assembly.

In America, the federal constitution prohibited legislative criminal justice. Early in the nineteenth century the courts put an end to legislative granting of new trials by refusing to recognize as valid the acts awarding them. Legislative equitable relief became obsolete in the fourth decade of the century, and was abolished by express constitutional provision or by judicial application of the doctrine of separation of powers where it still was theoretically possible. Appellate jurisdiction in the legislature or one house thereof was done away with before the Civil War in the two states which had adhered to it. Even legislative divorce, which hung on longest, came to an end in the third quarter of the century. We seemed to have achieved the ideal of a government of laws and not of men.

In legal and political history the specialization of function which has set off judicial justice and has been carried out most completely in America, proceeded very slowly. The first differentiation was a setting apart of the deliberative or legislative from the administrative or executive. Although the genius of Aristotle foresaw the further specialization that was to take place, it had by no means taken place in his day, and the Roman polity to the end regularly reposed judicial powers in administrative officials. To this day, in the

Roman-law world, the judiciary are thought of as a part of the administrative hierarchy. Many eighteenth-century writers carry their theory no further than separation of the legislative authority from the executive. After differentiation of legislative from administrative functions has gone a long way, the judicial function may remain undifferentiated and may be exercised by both the legislative and the administrative organs of the state. It happened that a strong judicial system grew up in England in the Middle Ages. Otherwise Aristotle's threefold distinction might not have been realized. The ordinary judicial functions of the English king passed to the courts at a relatively early date. Later, the residuum passed to the Court of Chancery. By the seventeenth century all royal judicial power was obsolete. Parliament retained judicial functions much longer. The most we can say is that, in the history of Anglo-American political and legal institutions, judicial justice has grown out of and has gradually been set apart from legislative and executive or administrative justice and in our political and legal development down to the end of the nineteenth century it tended to replace them.

Moreover, this development has gone along with the development of justice according to law. Hence we may well ask how far justice according to law and judicial justice are the same development seen from the respective sides of end and means. If they are, we may ask, on the one hand, whether justice according to law does not require a purely judicial administration in the modern state, and, on the other hand, whether a

judiciary has any special or peculiar qualification for that part of the administration of justice which must proceed to a greater or less extent without law. Such questions cannot be answered today merely by reference to history and vouching an idea taken to be realizing itself in historical development.

It has always been urged against judicial justice that it is too rigid; that it is too hard and fast, trusts too much to rule, and does not allow sufficient play to the non-legal conscience either in finding or in applying the law. In each case, it is urged, courts are governed too much by logical deduction. This is only another form of one of the stock complaints against justice according to law and comes down to a proposition that judicial justice realizes justice according to law most completely and so brings out its defects as well as its good features. For a time in the United States there was a tendency to temper judicial exercise of the deciding function by conceding extravagant power to juries. But the tide has set definitely in the other direction. The tendency today is to confine the jury to the crucial issues of fact and require them to decide those issues on evidence of rational probative force rationally weighed. Moreover, the civil jury, for the very reason that it tended to run away with the law and decide upon emotional and other irrelevant considerations, has proved an unsatisfactory tribunal for commercial cases and an expensive tribunal for all cases and has been gradually going out of use. Nor have attempts at tempering judicial exercise of the law finding or law declaring function by popular review of decisions achieved anything.

The mechanical jurisprudence, to which scholars in the other social sciences have taken so much exception in the present century, is not inherent in judicial justice. It grew out of the attempt in the nineteenth century to reduce everything to detailed rule, an attempt which went on in legislation and administration no less than in judicial decision. A tendency to logical analytical precision and classification and to rigid definition was characteristic of that century.

Objection is made also to the premises of judicial justice. It is urged that they are too narrow and pedantic and that the fundamental principles or authoritative starting points for judicial reasoning are too fixed so that judicial justice is too slow in responding to changes in the environment in which it must operate. This objection is the one chiefly urged by those who would take away from the courts matters in which social workers are interested, in which new premises have been demanded both as the basis of lawmaking and as the measure of application of legal standards. It is the one chiefly urged by those who have sought to change the venue of labor litigation from courts to administrative agencies. But experience has been teaching us something in these connections. Administrative criminal justice under parole laws has proved arbitrary and led to mutinies and uprisings in prisons, while the English Court of Criminal Appeal with its power of altering and adjusting sentences has gained public confidence. The experience of social workers with juvenile courts and probation agencies has convinced some of the leaders that they have much to learn from judi-

cial methods, and administrative handling of labor difficulties has not decreased the friction nor put an end to the lawlessnesses which have attended labor disputes in the past. It is quite possible that courts, seeking to secure all the interests involved rather than those of one side might have learned how to achieve the desired results as newer principles were prescribed for them by legislation and worked out by them from experience.

It must be remembered that attempt to set up new premises on a large scale by judicial lawmaking impairs the stability of the legal and so of the economic order. Judicial development of the law proceeds by analogical reasoning. It involves choice between competing analogies based on the principles of a taught tradition. New premises giving new analogies tend to unsettle more or less the whole legal system. Of course, if one does not believe in legal systems but conceives of each case as something to be determined by application of the power of politically organized society simply as such, as directed by economic self-interest or individual psychology or casual hunch, there is nothing more to be said. One need not go so far as Mr. Justice Brandeis and say that "it is usually more important that a rule of law be settled than that it be settled right." At any rate, the stability of judicial justice is no unimportant consideration.

A third objection to judicial justice is that it was characterized in the last century by a tendency to reduce to rule, along with those things which call for rule, those with respect to which rules are not practicable.

It is true that at that time courts did seek to reduce the details of procedure, evidence, administrative activities, and negligence to chapter and verse of exact rules. But, as I have said, this was a tendency of the nineteenth century in every direction, not an inherent tendency of judicial justice. The legislation of the New York Code of Civil Procedure went far beyond any judicial decision in subjecting every detail of proceedings in court to fixed rules. Legislation a generation ago often tied down administration quite as tight as judicial decision ever sought to do. In an investigation of police affairs in New York as late as 1912 most of the trouble was found to be due to minute and detailed legislation which prevented any effective control by the department. The legislative rules for maintaining discipline hindered efficiency and subverted discipline.

Again, objection is made to judicial interpretation of statutes and this objection is made the ground of seeking to commit the interpretation of significant social legislation to administrative agencies rather than to courts. Interpretation is a word of more than one meaning. It may mean finding an applicable legal precept by analogical reasoning, or it may mean ascertaining the intended meaning of a clearly applicable legislative precept, or it may mean finding a solution of a problem within the scope of a statute covering a whole field where the lawmaker did not think of it and made no provision for it, or it may be used to mean application of a legal standard. It is the last two of these meanings which are involved in the objections to judicial interpretation.

Judicial interpretation postulates that a formula prescribed by statute was meant to cover a certain definite area of fact discoverable and to be discovered. Hence it follows that when that area of fact is defined the formula is meant to cover all detailed situations of fact within it and the intended rule for any such situation of fact is discoverable and to be discovered. But frequently those who framed a formula to cover some field to the exclusion of the traditional law did not have in mind some particular state of fact which none the less is included in the field covered and so is within the purview of the formula. Thus there was no intent as to the legal result to be attached to that state of facts. Yet the postulate requires the courts to assume that the lawmaker had it in mind and had in mind an appropriate legal result. It requires the courts to work out the application of the formula to the facts in question on that basis. It is easy for skeptical critics to attack the postulate as not in accord with reality and to argue that because a nonexistent intent is sought for, the whole process is a sham and covers up arbitrary creation of a rule to the prejudices or psychological idiosyncracies of the court. Like all postulates of application of organized knowledge to practical action, the one in question is a generalized expression of a practical means of meeting the problem presented. In the application of statutes we must take account of the needs of those who must advise and of those who must decide. Those who advise demand predictability. There must be certain fixed assumptions from which they may proceed with reasonable assurance in considering the meaning

which the text will take on when applied to some particular set of facts. On the other hand, those who decide demand a margin for doing justice in the case before them. They seek a freedom to mold application of the formula to unique as contrasted with generalized states of fact. The law has to take account of both these needs and to reconcile them. Criticism solely from one of the two standpoints misses the real task.

Failure of labor legislation in the past to achieve what its proponents expected of it was by no means wholly the fault of the courts. Partly also it was the fault of the legislators and in greater part it was the fault of the times. It was attributable to current ideals of justice which were the background of judicial interpretation. As an example of how statutes may fail of expected results, we may note a type of labor statute which was much urged two decades ago. It was assumed that equity would act only to protect property. Hence, it was said, if the right of an employer upon a contract of employment is not a property right, courts of equity cannot act to secure it. Hence, it was said, a statute declaring that labor is not a commodity will defeat injunctions in labor cases. The assumption was quite wrong. Courts cannot justly be blamed if such a statute did not result as it had been expected to.

There was more reason of complaint with reference to judicial application of the standard of due process of law. But this was not a matter of interpretation. The historical interpretation of the phrase to refer to arbitrary and unreasonable official action was entirely sound. The difficulty was in setting up an abstract

criterion of reasonableness whereas the characteristic of a standard is that it must be applied concretely to the circumstances of the time and place. The nineteenth-century attempt to lay out reasonableness in a series of rules such as rules of property did infinite harm by creating distrust of courts and judicial methods and keeping it alive long after the courts had come to look at reasonableness concretely and to apply the standard as such and not as a rule.

As to the advantages of judicial justice, with respect both to the law declaring and to the deciding function, it combines the possibilities of certainty and of flexibility better than any other form of administering justice. It provides for certainty through the training of judges in logical development and systematic exposition of authoritative materials for decision. It provides for growth by permitting a testing of received premises with reference to concrete causes and correction of rules by extension or restriction through experience of their application and a gradual process of inclusion and exclusion upon rational principles.

Again, there are the checks upon courts of which I spoke fully in another lecture. Again, judges on the whole, will stand for and enforce the law in the face of excitement and clamor and political pressure, and so will uphold ultimate and more significant interests against those who urge the nearer and in the end less significant claims which are on the surface. There are three reasons for this. They do so because of their training in the law as a taught tradition. They do so because of their habit, inculcuated by their training, of seeking

always to act upon principles. They do so because of consciousness that their decisions will be preserved in permanent form and will be subject to criticism by the profession after popular criticism at the moment is forgotten. Legal history is full of examples. To take some which are no longer controversial, compare the "legislative lynchings" of loyalists during and after the Revolution with the steadfastness with which judges protected them in their legal rights even when threatened with popular vengeance. Compare the legislative and executive mistreatment of uitlanders in the South African Republic with the firm stand for law taken in their behalf by Chief Justice Kotzé at the risk of his position. The significant feature in the labor cases, so much insisted on today, is the firm stand of all courts for the taught legal tradition against pressure of groups and organizations before which legislatures and executives would have given way. If this characteristic of judicial justice holds back some things for a time, yet it upholds much more and on a balance this must not be overlooked. The whole training and traditions of the bench make courts resistant to influences from without. Private conferences and secret interviews which are regarded as venial if not proper in an administrative official and are treated as a matter of course in a legislator, are ground of impeachment in a judge. But the traditions of bench and bar forbid a judge's defending himself in print or engaging in acrimonious controversy over his "record" as political officials may and do defend themselves. Hence misrepresentations of judicial decisions remain uncontradicted, and in-

accurate or distorted versions of the law as declared by judges gain credence in quarters where one would look for more critical scrutiny of the facts.

That there is a partial discredit of judicial justice today throughout the world cannot be denied. It is in marked contrast with the over much faith in judicial tribunals in the last half of the nineteenth century. Some of the causes of this are operative everywhere; some of them, on the other hand, are operative wholly or chiefly with us. First among the causes of general operation we may put the rise of absolute political ideas and the give-it-up philosophies of which I have spoken in other connections. The vogue of economic interpretation gives rise to a feeling that since all determinations are necessarily made arbitrarily, judicial justice is a hypocritical business and we may as well give up courts as a farce and commit all determinations to administrative agencies. Much of what is argued in this connection goes on a fallacious assumption as to what affects the work of "the judge," as if all judicial action was had in one-judge courts. "The judge" is an abstraction of the kind which realists profess to abhor. When any determination of consequence is made by a single judge in a one-judge court, it is subject to be reviewed in an appellate tribunal before a bench of judges—anywhere from three to nine, and usually five or seven. Judicial review before a bench of judges is a very different thing from administrative review. The law has always insisted that those to whom exercise of reviewing jurisdiction is confided act in person. The Roman law forbade those delegated by the emperor to hear appeals

hearing them by delegates. It was settled in the canon law that the delegates appointed by the Pope to exercise his appellate jurisdiction could not delegate their authority to others. There is no such thing as a judge exercising his judicial authority otherwise than in person or a bench of judges otherwise than as a bench. But administrative review is too often a one-man review, very likely exercised by a secretary or by an administrative head applying a rubber stamp. It is not unlikely to be a review of his subordinates by themselves. Much of what is said about the psychology of decision which might apply to administrative review is inapplicable to review before a bench of judges in an appellate court.

A second cause of general discredit of judicial justice results from the mechanical idea of judicial justice on which analytical jurists insisted in the last century. It was conceived that there was a rule of law for every case, either expressly set forth in a code or statute book or deducible from code or from fixed traditional premises by an infallible logical process. As one might put it, a court was a slot machine into which one put the facts at the top and upon pulling a lever drew out the preappointed decision at the bottom. This mechanical theory of the judicial office was well understood even in its day to be an ideal rather than a description of what actually took place. It is not held seriously today except as certain realists urge that because it is not a true picture of the judicial process therefore there is no such thing as law. But that men did very generally in the latter part of the last century entertain such an

ideal has worked harm to judicial justice in that it leads to general exaggeration of the extent to which the courts fall short of what they might be since they so obviously fall short of the impossible postulate held up in the immediate past.

Most of all, however, judicial justice is in discredit for the reasons for which law is in discredit. The old ideals of justice are being given up, and new ones have yet to be found. The administration of justice must go on upon the basis of received ideals which govern starting points for reasoning, exercise of discretion, application of standards, and interpretation. If those ideals become hazy, as they must in an era of transition, the administration of justice will either be overrigid by reference to ideals which are no longer valid, or else at large for want of ideals giving clear guidance. It is not likely in such an era that administrative justice will discover the needed ideals sooner or define them better than will judicial justice.

Four causes of discredit of judicial justice are operative especially in the United States.

First, a bad adjustment between law and administration, traditional in common-law countries for historical reasons, gave rise to conditions of mutual distrust on the part of courts and administrative agencies. This attitude on the part of the courts came to an end some time ago. Courts today appreciate the necessity of administrative regulation, the compatibility of administrative application of standards, administrative implementing of legislatively declared policies, and administrative determinations of fact with the con-

stitutional separation of powers, and the need of care that in reviewing administrative action the discretion of the court is not substituted for the discretion of the administrative agency as to matters committed by statute to its discretion. But the zeal of administrative officials makes them restive under requirements of due process of law and the layman, knowing what the attitude of the common-law courts was at one time, is likely to assume that it still obtains and to sympathize with the desire of officials to be free from legal checks. Most of the books written by laymen which discuss the relations of courts and administrative agencies speak of them in terms of the conditions in the last decade of the nineteenth century.

Second, the putting of the courts into politics which took place about the middle of the last century has had serious consequences with the rise of huge metropolitan urban communities in the present century and the general practice of nomination by direct primary. In a polity in which so many political questions are legal and so many legal questions are political, an independent judiciary, free from political influence is imperative. On the whole, in the rural agricultural era the traditions of the bar and the inherited respect for the bench on the part of the laity preserved judicial independence even if occasionally a great judge did fall a victim to a political landslide. Even today, the professional tradition keeps the bench independent far beyond what we have reason to expect under the political conditions of our large cities. But the effect of politically chosen, short-term judges, holding at the will of

direct primaries is not wholesome and consciousness of this impairs the credit of the bench.

Third, the archaic organization of courts which obtained in the last quarter of the nineteenth century and still obtains in too many of the states, stands in the way of judicial achievement of the best of which judicial justice is capable. Our courts were organized originally to the model of the English judicial system of the seventeenth and eighteenth centuries. This system was very confused. A multitude of tribunals had grown up or been set up to no systematic pattern, reduced to no order, and often with far from clearly defined limits of jurisdiction. Some tribunals had come down from before the Conquest. Some had taken form in the great creative era in the twelfth and thirteenth centuries. Some had come over from the medieval partition of jurisdiction between the political organization of society and the church. Some had grown up in the development of administrative justice under the Tudors and Stuarts. Some were the creatures of statutes dealing with situations of time and place between the thirteenth and the sixteenth century. In colonial America after 1688, there begins to be a separation of judicial from legislative and administrative functions and this goes forward in the fore part of the eighteenth century. In general, courts of petty jurisdiction, civil and criminal, courts of administrative jurisdiction, courts of general jurisdiction of first instance at law, courts of equity jurisdiction, courts of probate jurisdiction, courts of superintending authority, and courts of appellate or reviewing

authority came to be more or less differentiated. But American conditions led to one notable departure from the English system. The trial courts were localized. Local justices of the peace were generally available to make up a court. Hence there was no great confidence in these tribunals and a system of repeated successive appeals and extravagant powers of juries was the result. In the nineteenth century, the differentiation went on and a typically American system developed. In most of the states there was no idea of one court of general jurisdiction of first instance with a proper administrative organization. Local circuits or districts with one judge for each became the usual plan. Where there were large cities these one-judge courts were multiplied. A pioneer community admitted of equal local districts and this system became fixed. The result was waste of judicial power, clashing of independent co-equal tribunals with no administrative superintendence, and a system of appeals from one distinct court to another by new proceedings instead of review as a continuous proceeding in the same cause. The federal court system has been modernized in the present century. But few states have a modern judicial organization and in all of the states a unified system is much needed. The courts as they are constituted today are not organized so as to be able to do their work with a maximum of efficiency and dispatch. The consequent dissatisfaction impairs the standing of judicial justice in the public mind.

Third, our legal procedure at the end of the last century, made over from the elaborate overrefined

eighteenth-century English procedure to the conditions of pioneer, rural agricultural America of our formative era, was out of date. Cases were tried not on the cause itself but on the party's diagnosis of it. Cases failed continually because brought in the wrong court or in the wrong way. On appeal the record was tried, not the case. Litigation became a game to be played on elaborate rules of stating cases and defenses and arriving at issues. There was lavish granting of new trials. Detailed legislation imposed rigid rules of procedure which prevented courts from getting speedily to the merits of controversies. The courts became behind in their work and the organization imposed by constitutions and statutes aggravated the congestion of dockets and consequent delay in disposition of cases. It is no wonder the dissatisfaction with the administration of justice became general. Much of what caused this dissatisfaction has been remedied. Much more is being remedied. Yet everywhere there is much still to be done.

Finally, the deprofessionalizing of the bar which began in the days of Jeffersonian democracy in our formative era, with the advent of large cities led to a stratum of undesirable practitioners at the bottom and many bad practices at the top in what had become an unorganized and undisciplined profession. This condition began to be remedied in the last decade of the nineteenth century and in the last two decades organization, discipline, proper conditions of admission and adequate requirements of preliminary education and professional training have been going forward fast. But

this bad condition in the profession a generation ago produced an impression on the public mind which affected the public attitude toward the courts.

With good reason the public at the beginning of the century were dissatisfied with the work of the courts and inclined to turn to other agencies of administering justice. It was not an easy task to overhaul the organization of courts, legal procedure, and conditions of admission to practice and of practicing law which had grown up in our formative era. Legislative tinkering of details often aggravated bad situations instead of improving them. That the courts did their work so well under such serious handicaps is an eloquent testimony to the possibilities of judicial justice. Now that legislation is restoring the common-law powers of the judiciary and recognizing the constitutional powers of our courts to deal with abuses in the light of their experience of them, we may expect the courts by their improved work to regain the confidence which Americans long reposed in them.

Judicial justice has had its highest development in England and America. It has grown up with representative government and constitutions and legal checks on arbitrary exercise of the powers of politically organized society. The real threat to judicial justice is the rise of political absolutism throughout the world in a time of disillusionment and give-it-up social philosophies. Its future is that of the institutions which were developed in medieval England, shaped by the Puritan Revolution, adapted to the New World in formative America, and have made possible, not merely in name

but in reality, a government of the people, by the people, and for the people.

SUBSTITUTES FOR LAW

AN ADDRESS BEFORE THE ALLEGHENY COUNTY BAR ASSOCIATION

WHAT we do hangs not a little on what we believe we can do, what we seek to do, what we believe we are doing. This is especially true in the social sciences such as politics and law. The great things done at the end of the eighteenth century and in our formative era were the work of men who believed they could do great things and so found themselves able to do them. The constitution of the United States was the work of men who believed in a fundamental law, who believed it was possible to govern according to a fundamental law, who believed in rights and in the possibility of upholding them by law, who believed in the binding moral force of covenants and so in the efficacy of the covenant of a free people not to do certain things and not to do certain other things except in a specified way. The working out of a common law for America from the seventeenth and eighteenth-century English land law and English procedure was not done by men who expected law to develop itself by the inherent power of an idea of right to realize itself nor by men who believed that law was only the product of the self-interest of a dominant social class, or the individual psychology of the judge determining the case in hand,

or whatever was done officially by whoever exercised the force of politically organized society in the time and place. Our American law, as it was wrought between the Revolution and the Civil War, was the work of men who thought of law not in terms of threats but of rules of reason, not in terms of force but in terms of freedom, not in terms of enactment of the will of a lawmaker but in terms of reasoned ascertainment of the demands of justice. Both those who framed and those who interpreted our constitutions believed in an ideal body of natural rights. Both those who enacted laws and those who interpreted and applied them and ascertained and applied the unwritten law believed in natural law, an ideal body of precepts discoverable by reason and binding on men as rational beings because of their inherent moral force. I am not here to preach a going back to eighteenth-century doctrines of natural rights and natural law as such. But I do insist upon the role of ideals. Nothing is better than we seek to make it.

In place of the rationalist philosophy of the eighteenth century which had an exaggerated faith in reason, believed that anything could be achieved by sheer force of reason and that creative reason was equal to solving all the problems of government and law and working out a complete and perfect code, declaratory of natural law, which would require nothing of a court but mechanical application to the facts of particular controversies—in place of this we have seen everywhere since the last world war the rise of give-it-up political and legal philosophies. We are taught that we can't

do any of the things we believed we could. All that we have deceived ourselves into believing in politics and law is illusion, superstition, and pious wish.

Such things have happened before in the history of thought. Greek philosophy in the Hellenistic era, an era which had much in common with our own, took a like course. The Peloponnesian War had exhausted the Greek city-states. All Greece had fallen into the hands of Philip and had been swallowed up in the empire of Alexander. An age of independent city-states with more or less democratic polity was succeeded by one of great military empires ruled autocratically. The mark of the thinking of the time was disillusionment, just as that has been the mark of the thinking of the time since the last world war. Epicureanism and skepticism were exactly the philosophies we should expect to grow strong in such an era.

Epicurus was wholly indifferent as to the form of political organization. He thought of justice not as a regime, of public justice not as a phase of social control by politically organized society, but as something variable involved in men's relations and dealings with one another, to be looked at from the standpoint of the individual happy life. He held that the wise man would shun public life. If the ruler was wise, then the wise man seeking to live a happy life need have no fear of being disturbed by him. If the ruler was a tyrant, then the wise man, like Br'er Rabbit, would "jes' lie low" and so escape the tyrant's notice and live an undisturbed life of happiness.

Pyrrho, the founder of the skeptics, held that it was

not possible to have certain knowledge. We could only form individual opinions. Hence the right attitude toward all things was one of imperturbability. We must suspend judgment about things and make the best of them. The wise man did not pronounce judgments about things nor seek to promote causes or establish or disestablish institutions, as to which he was as likely to be wrong as to be right. The highest good was a condition of undisturbed passivity, a making the best of things as they came.

In Rome, after three generations of civil war, these give-it-up philosophies became fashionable. Under the empire what use was there for any philosophy of politics or social control? Philosophy responds to practical problems of life and puts its solutions of them in universal forms. The problem of that day to the cultivated Roman was how to live in those distracted times. The skeptic who told him to keep cheerful and avoid taking sides, and the Epicurean who told him to be imperturbable and inconspicuous, seemed to offer practical solutions put in philosophical form.

"What is truth? said jesting Pilate, and would not stay for an answer." So wrote Bacon in his *Essay on Truth*. But Pilate was not making a bad joke. He said in entire seriousness what any educated Roman of his time would have said to one who proclaimed that he had come into the world to bear witness to the truth. But let us take another contemporary example. I have long thought that the parable of the Good Samaritan was addressed to the give-it-up philosophies of the first century. The priest and the Levite, let us say an Epi-

curean and a skeptic, are jogging down the road and find a poor fellow, a victim of bandits, lying wounded and half dead in the ditch by the roadside. Says the priest, I must consider whether my individual happiness will be promoted by stopping to look after this poor fellow, or whether, on a careful balance, the danger that the bandits will get me too unless I am at the inn before nightfall involves more unhappiness than the happiness I might derive from an act of benevolence. So he is imperturbable and jogs on. Says the Levite, I don't know. I can't be sure. It is possible that the bandits may be right and I wrong. One can't make assured judgments of right and wrong. I must preserve an undisturbed passivity. So he goes by on the other side. But now comes the Samaritan, an uneducated fellow, with no philosophical doctrines to stand in the way of his natural feelings of humanity, and takes pity on the man lying in the ditch, binds up his wounds, puts him on his beast and takes him to the inn. The philosophers had eliminated all moral element in conduct, but the Samaritan was guided by what philosophy had rejected.

In the same way in the give-it-up political and legal philosophy of today all ethical and rational element in lawmaking and judicial decision is eliminated.

A change from the rational moral political and legal philosophy of the eighteenth century and the ethical idealist political and legal philosophy of the nineteenth century began in the sixth decade of the last century when Marx announced his economic interpretation of history. The ethical idealistic and political idealistic

interpretations of political and legal history, dominant in the nineteenth century, began to give way at the end of the century before the conception which Marx propounded in 1859. Where history had been taken to be a record of the unfolding in human experience of the idea of liberty, Marx asserted the unfolding or realizing of an economic idea—the idea of satisfying material human wants. For some three decades this interpretation remained unnoticed. It was taken up in 1889, got much vogue in continental Europe in the last decade of the century and came to the United States at the beginning of the present century, where it has had increasing vogue. Out of it has grown what is called economic determinism, a doctrine that all the phenomena of law and government are necessarily and inexorably determined by purely economic causes; that every act of legislation and every exercise of the judicial function is inevitably in the nature of things dictated and shaped by the self-interest of the dominant social and economic class in a society which, by a like necessity, will be class organized until the ultimate doing away with private property. The legal order is a regime of force, the force of a politically organized society, applied at the instance of a socially and economically dominant class upon those whom that class is able to constrain. Thus, law is whatever is done officially in the way of imposing the force of such a society upon those subject thereto. The motivation of imposing of that force is purely economic. Precepts and principles and doctrines and ideals are illusion or superstition or wishful thinking. They are used to

cover up results reached independently on a purely economic basis.

Somewhat later, in the train of Freudian psychology there grew up what is called psychological realism. In this doctrine the basis of political and judicial action is found in the Freudian wish. Men do what they wish to do. What they do is the consequence of wishes, which may be unconscious and deep seated, but are nonetheless controlling. Not the least potent of these wishes, however, is a wish to appear rational and consistent in all that one does. Hence, acts motivated by unconscious wishes are given a cloak of reason by appeal to laws and principles and doctrines. But judicial action does not proceed upon the basis of these laws and principles and doctrines. They are invoked after the particular action has been determined upon and arrayed in specious arguments to satisfy the wish to act upon rational principles.

Economic determinism and psychological realism agree that in the nature of things objective, impartial judicial determinations are impossible. The whole theory of the judicial process which has obtained in the past is superstition or myth or pious fraud.

Einsteinian relativist physics and neo-Kantian philosophy came later to the support of economic determinism and phychological realism and have given us skeptical realism. The predictability and regularity of the phenomena of physical nature had been the cornerstone of political and legal philosophy since Greek philosophers first sought to organize men's ideas of social control. As one put it, although customs and laws

differ from land to land and city to city and time to time, fire burns and water flows in Greece, in Persia, and in Carthage. Where the conduct of men might be wilful and capricious and unpredictable, the sun rose and set, the moon went through its phases and the seasons succeeded each other in regular and unvarying and predictable order. Thus there seemed to be an eternal order of things, a natural proceeding by rule or law, which was to be a model for human government of society as it was of divine government of the universe. Nor was this order of nature merely a basis for theories of politics and law. Equally it gave a basis for ethical theory. There was taken to be a moral order analogous to the stable order of the physical universe. The conduct of the upright man was predictable. He was constant in family and business and social relations. He was, as we say, reliable. We could be sure what he would do and would not do. He was, as we say, trustworthy. His neighbors could put their trust in his word, which needed no external coercing agency to keep him to it but was as good as his bond. On the other hand, the unrighteous man was unprincipled. His actions were unpredictable because they did not conform to principle. He was unreliable and untrustworthy. His conduct did not conform to the divine order of nature and the divinely ordained moral order on its model. From the Hebrew psalmists to the Greek philosophers of the fifth century B.C., to the medieval theologian philosophers with their theory of the reason of the divine wisdom governing the universe by the eternal law, to the rationalist natural law of the seventeenth and

eighteenth centuries, this argument from physical nature seemed decisive.

Today, after physicists since the beginning of their science in the modern world had been telling us of laws of physical nature and teaching regular sequence of cause and effect and conformity of natural phenomena to established rules, they have begun instead to speak of contingency of the laws of nature, random natural phenomena, and effect without cause. How far this will go ultimately, it is not for lawyers to say. But the effect of relativism in physics upon relativism in the social sciences has become manifest. With everything at large in the universe generally, a feeling that everything is equally at large in human institutions and human behavior was to be expected. This feeling is reinforced by the neo-Kantian political and legal philosophy which has prevailed since the last world war.

Neo-Kantian relativism teaches that we cannot know things as they are. All that we can know is an individual mental creation which we make of our individual perceptions and experience. But no two of us have exactly the same perceptions or experience to build with. Hence there is no ought-to-be which is the same for all. Our ideas of ought-to-be are purely subjective. They are valid only in our individual systems of thought and cannot be proved to any one else. Yellowplush said about spelling that every gentleman was entitled to his own. The neo-Kantian holds to the same doctrine as to systems of morals. Every one must have his own starting point, which he cannot prove and no one can

disprove. All that can be demanded of him is that the details of his system follow logically from his individual starting point. As nothing can be proved in the way of fundamentals in the social sciences, there are irreconcilable contradictions at the bottom of politics and law. There is an irreducible antinomy between law and morals and between social control by politically organized society and justice. Hence, we may as well leave morals and justice out of account in our theories of law and government, thus giving us a "pure science" in each case. Laws are nothing but threats of exercise of the force of those who wield the power of politically organized society. We postulate an ultimate political power and all derives from it. Constitutional limitations are contradictions in terms. A pure science does not trouble itself about subjective ideals of balance and guaranteed liberties and rights. What in our self-delusion we have called rights are no more than inferences from the threats of exercise by state officials of the force of politically organized society.

In the science of law the movement beginning in Marxian economic determinism, reinforced by Freudian psychology with its discounting of reason, given further impetus by Einsteinian relativism, and aided and abetted by neo-Kantian social philosophy, culminates in skeptical realism, a doctrine skeptical of everything but its own skepticism, professing to abhor dogma and hold fundamentals unprovable, yet dogmatically assuming Marx's economic interpretation and applying it to every item of the judicial process, dogmatically assuming that the Freudian wish looked at from an

economic standpoint is behind every phenomenon of the legal order, and dogmatically assuming that as these assumptions cannot be disproved neither do they admit of proof, no amount of evidence from the every-day operations of the legal order and the judicial process can affect them. We are to start from them as unchallengeable starting points just as the glossator started from the text of the Corpus Juris or the medieval theologian jurist from the Bible or Coke from the text of Littleton. But at the same time we are not to believe that there are fundamentals.

Skeptical realism regards anything that is done officially as law because it is done officially. It denies that there are rights or duties which go before and are the justification of legal precepts. They are rather consequences of the threats of exercise of state force. It denies that there is any ideal element behind judicial decisions or administrative determinations. It pronounces constitutions and laws (in the sense of authoritative guides to decision) and legal conceptions and legal principles as delusion or deception. It rejects the idea that the judicial or the administrative process may be carried on according to law or without law or against law. Each individual item of the process, independent of every other, is of itself law for itself because it is done by a power which maintains itself superior to all other powers.

A closely connected mode of thought which is coming to be imported from continental Europe is called phenomenalism. In physical nature it finds reality in phenomena themselves. They require no justification.

They stand upon their own phenomenality. We cannot criticize the operations of nature. It is futile to speak of what they ought to be. It would be of much advantage for the calendar if the phases of the moon and the revolution of the earth around the sun could be rearranged so as to give us months of exactly twenty-eight days each and years of exactly twelve of such months. But such things are beyond our control and it is futile to talk of what they ought to be. When Carlyle was told Margaret Fuller had written, "I accept the universe," he replied, "My God, I should think she might." Applied to the social sciences and assuming that judgments of right and wrong, pronouncements as to good and bad, are merely subjective opinions, this mode of thought conceives it to be unscientific to ascribe such qualities to the phenomena of government and adjudication and administration. It is futile to speak of what they ought to be. Science is concerned only with what they are.

Marx believed in the ultimate disappearance of law in an ideal propertyless and therefore classless society. Others besides orthodox Marxians, influenced by the skeptical and relativist theories of the time, are urging that law is a disappearing institution. Still others, in the belief that we are about to enter upon a new age and live in a wholly transformed world, have faith that in such a transformed world law will be unnecessary and become obsolete. But a society without social control is hardly conceivable. What, then, is to take the place of law in any or all of the meanings of that term? What is to replace the legal order, the regime of adjust-

ment of relations and ordering of conduct by the systematic and orderly application of the force of politically organized society? What is to replace the body of authoritative guides to decision, the authoritative technique of developing and applying them, and the received ideals in the light of which they are formulated, interpreted, developed, and applied? What is to replace the judicial process, in which causes are determined in accordance with the authoritative guides to decision as ascertained and developed by the authoritative technique? Four substitutes have been dreamed of or argued for or attempted: First, a regime of just men deciding each case for itself by the light of nature and according to their individual sense of justice for the time being; second, a regime of free contractual self-determination; third, a purely administrative regime proceeding on the basis of intuition developed by experience; and, fourth, a system of committees in a corporative state.

There is nothing new in the first of these substitutes for law. More than one era of religious enthusiasm has looked forward to an ordering of society without law. From antiquity every Utopia which has been devised has been made to operate without lawyers, and that means without law. One thinks at once of the wise and just king administering justice in person—of Solomon, of Harun al Rashid, of St. Louis under the oak at Vincennes. Originally the English chancellor, who decided at first *ex aequo et bono* with no law to guide him, was the representative of a king doing justice personally in exceptional cases. Very likely the last representative

of this judge-king is the magistrate with a petty jurisdiction applying his unaided good sense to causes too small to justify the costly and deliberate operations of the ordinary courts. But royal justice long ago became obsolete. Equity crystallized. A better system of inferior courts is everywhere replacing the old-time squire. Nor did the experiment of putting laymen on the bench of our higher courts or associating lay judges with law judges, often tried in the formative era of American law, achieve the results expected. It soon appeared that that no layman, simply because he was wise and just, could pass on causes involving the multitude of conflicting and overlapping interests in a complex social order. No man, simply because he is just, can decide merely by his personal canons of justice the many cases where the incidence of liability has to be determined as between persons equally culpable or equally blameless or as to which the main difficulty is that there are no clearly applicable precepts of morality or settled moral principles.

In the last century there were many who urged what was called philosophical anarchy. They urged in place of the legal order a regime of free contractual self-determination, a regime in which rights and duties were to be fixed and relations were to be adjusted by free agreement of those concerned. At that time, it was generally held that free contract, free self-determination, was the end of social development. It was believed that a progress toward the fullest regime of free contract was indicated alike by history and by metaphysics. This idea of substituting contract for govern-

ment as the agency of social control presupposed the sanctity of promises. It assumed that promises would carry with them their own fulfilment. It rejected Hobbes's aphorism that covenants without the sword are of no avail. Moreover, it was a carrying out to its logical limits of the abstract individualism of that time. Today we hear little of a universe ruled by contract. We are no longer willing to hold a promisor to fulfill his promise to the last scrap of his substance—even to the giving up of his shirt and trousers, *usque ad saccum et peram*. We now expect the promisee to take at least a great part of the risk. As the realists see it today, a promise is no more than a prediction. I suppose the realist's promissory note would read: "Ninety days after date for value received I predict that I shall be able and willing to pay John Doe or order one hundred dollars." I like to think what the assets of a bank would be worth under such a conception of a promise. But at any rate, that conception affords no basis for a theory of social control. Certainly in the present century there has been no movement toward a diminished area of the legal order. So far from increasing self-determination by free contract, the scope of free contract has continually diminished and the domain of interference with contract, of administrative and judicial regulation and legal defining of rights and imposing of duties, and the area of governmental adjustment of relations, have steadily increased.

Today we hear chiefly of an administrative regime, a regime of official orders for each situation and each controversy as a substitute for law and laws judicially

applied. The Marxian doctrine that law is the product of a class-organized society, as required to enable a dominant propertied class to hold down a propertyless class by the force of politically organized society, has led many to assume a necessary connection between property and law. No doubt a regime of private property requires law. But it does not follow that a regime of law requires property, much less that it depends solely upon a law of property in land. An administrative regime, however, fits more easily into a theory of law as resting wholly on state force and so has proved congenial to the proponents of analytical doctrines. Writers on comparative public law from an analytical standpoint began to urge it a generation ago. In the immediate past it was taken up by Professor Paschukanis, the economic and juristic adviser of Soviet Russia. He combined Marx's teaching as to the disappearance of law with the doctrine of German teachers of analytical politics and told us that in the socialist state there was to be no law, or rather but one rule of law, namely, that there were no laws but only administrative ordinances and orders. The professor is not with us now. With the setting up of a plan by the present government in Russia, a change of doctrine was called for and he did not move fast enough in his teaching to conform to the doctrinal exigencies of the new order. If there had been law instead of only administrative orders it might have been possible for him to lose his job without losing his life. The doctrine presupposes an absolute omnicompetent state and that there are no rights to be secured but only force to be employed.

Finally, there is the idea of the corporative state, as it is called; a state in which the occupational group is to be the unit, not the individual man. In such an organization of society, we are told, disputes between members of the same group are to be adjusted by a committee of that group, while if controversies arise between members of different groups they are to be settled by a general committee in which the different groups are to be represented. Each controversy is to be adjusted as something unique with no reference to any other. Apparently no basis of advice will be called for because an omnicompetent state will conduct all enterprises and what it does will be self-sufficient. One is reminded, however, of the regime of kin discipline and of the king determining disputes between different kin groups and between kin groups and kinless men in the earlier societies of antiquity. Law grew out of that process and if the process is repeated, law may grow out of it again. But as yet the regime of committees exists only in promise. It has not been put into practice.

Of the two recent projects for a substitute for law, the Marxian idea presupposes that all disputes arise out of property and will be obviated on the abolition of private property. But granting that no one owns anything, yet some one will have to possess and use things and controversies as to possession and use can be as difficult of solution as controversies over ownership. The idea, then, presupposes that there will always be enough of all the desirable material goods of existence to give each all he can wish so that no contentions as to use or enjoyment can arise. Further it presupposes

that there will not be conflicts or overlappings of the desires or demands which we call interests of personality and interests in the domestic relations or that these conflicts will be so simple as not to require more than an offhand determination for each case. Perhaps it assumes that there are no recognized claims or duties in domestic relations. But apart from this there is nothing in experience of relations in a complex society in a crowded world to warrant faith in either presupposition.

As to the project for adjustment of relations and ordering of conduct in the corporative state, it presupposes that each of us is in some one group, to which all his relations with his fellows are to be referred, or at least that the only significant groups in which men find themselves are economic. It is no doubt true that in a sense society is organized in groups and associations and relations. But it is true also that each of us finds himself in more than one of these groups and associations and relations, some having a stronger and some a lesser and some a feeble hold upon him. It is by no means true that all of these groups and associations and relations are economic or even that the only significant ones are economic. In the past, religious associations have proved the most enduring and resistant of human institutions. They have often proved stronger than political organization, even if held together by belief not by force. Men have proved quite as prone to fight for their beliefs as for their pocketbooks.

After all, the lawyer has a practical answer to the give-it-up philosophers which the skeptics who style

themselves realists cannot meet with mere philosophical theories of knowledge. Law is a practical matter. Its postulates are formulations of experience in practical tasks developed by reason and tested by further experience. If they are near enough to reality for the practical purposes of practical tasks that is all we need demand. Granting that we cannot lay down absolute canons of valuing interests and claims which can be demonstrated one hundred per cent, and must be accepted by all at par, it does not follow that we cannot, as we have done, learn by experience canons which will do the work of maintaining and furthering civilization. That texts of the Roman law laid down by jurists of the time of Cicero have proved adequate instruments of justice ever since and are applied throughout the world today is sufficient evidence. Because Einstein has taught us that we live in a curved universe in which there are no planes and straight lines and perpendiculars and right angles, it does not follow that we are to give up surveying. The postulates are near enough to the actual for the practical purposes of a practical activity. The phenomenalist's argument that we may study phenomena and learn what they are but that it is unscientific to criticize them is not applicable to the social sciences. There the question is both of what is and of what ought to be. If man by taking thought cannot add one cubit to his stature, yet men by taking thought have added many cubits to their moral stature, as shown by the whole history of civilization. When the skeptical realists who proclaim it unscientific to ascribe praise or blame to phenomena and object to qualifying

things as mere assertion of subjective opinions without value—when they ascribe epithets of myth, delusion, superstition, pious wish, and fraud to the phenomena of the legal order and the judicial process they condemn their own method out of their own mouths.

As I have said on other occasions, the term realism, as applied to the doctrines I have been considering, is a boast, not a description. So-called realism in political and legal philosophy is related to realism in art rather than philosophical realism. Like realism in art, it is a cult of the ugly. The realist in art says the ugly exists in nature, therefore it is true. To be true I must paint the ugly. But when he says the ugly is real he may mean it exists, which no one can deny, or he may mean that it is significant, which is disputable. An artist commissioned to paint the portrait of a judge noted that he had a great fist and had a habit of holding it out before him. Accordingly, as a realist, he painted the fist elaborately in the foreground as the outstanding feature of the portrait behind which, if one's gaze can get by the fist, one may discover in the background a thoughtful countenance. The judge does have such a fist and does hold it in front of him on occasion. But I doubt if any one thought about it till the artist seized on it and made it the main feature of his portrait. The fist exists. But is it the significant feature of the judge? Is reality, in the sense of significance, in the fist or in the countenance?

So it is with juristic realism. We have always known that the judicial process does not conform absolutely and in all respects to our ideal of it. Despite all the checks with which we surround it, it does not come out

in every case as we could wish. But the striving for the ideal goes far to realize the ideal. It is the approximation to our ideal of it which is significant, not the fallings short, which we seek continually to control and reduce to a minimum. If a theory of social control through the force of politically organized society is made from the fallings short rather than from the achievements, we shall undo what has made increasingly for civilization since the beginnings of modern law in the later Middle Ages.

We must bear in mind that the theories of disappearance of law go along with, have developed side by side with, absolute theories in politics. The two are phases of the movement toward absolute government which has been going on in every part of the world. The theories of law in terms of threat and force are part of a general cult of force. The real foe of absolutism is law. It presupposes a life measured by reason, a legal order measured by reason, and a judicial process carried on by applying a reasoned technique to experience developed by reason and reason tested by experience.

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